

DECISIONS

DE LA

COUR D'APPEL.

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QUEBEC.

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EUSÈBE SENÉCAL & FILS, IMPRIMEURS-ÉDITEURS,

20, Rue Saint-Vincent.

1883

ERRATA.

Page 54, ligne 29, au lieu de *delay* lire *day*.

Page 78, ligne 19, au lieu de "Demolombe 710" lire "Demolombe, Tome 10."

Page 78, même ligne, au lieu de "*Laurent 76*" lire "*Laurent*, Tome 6."

Page 116, ligne 3 du sommaire, au lieu de *make* lire *made*.

Page 151, ligne 17, au lieu de "1717" lire "1747."

Page 151, ligne 22, au lieu de "1583" lire "1652."

Page 152, ligne 25, au lieu de *arrêt* lire *arrêté*.

Page 154, ligne 7, au lieu de "1017" lire "167."

Page 155, ligne 7, au lieu de *L'effet et* lire *L'effet de*.

Page 155, ligne 9, au lieu de *Tel a lieu postérieurement et* lire *S'il a lieu postérieurement, si*.

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DÉCISIONS

DE LA

COUR D'APPEL.

Queen's Bench Reports

QUEBEC.

MONTREAL, 24TH NOVEMBER, 1882.

Coram MONK, RAMSAY, TESSIER, CROSS & BABY, J. J.

No. 342.

ROBERT REFORD & AL.

Defendants in the Court below,

APPELLANTS;

&

LES ECCLÉSIASTIQUES DU SÉMINAIRE DE SAINT-SULPICE DE MONTRÉAL,

Plaintiffs in the Court below,

RESPONDENTS.

QUESTION OF SUBROGATION.

CROSS, J.—On the 20th June, 1872, Peter Redpath sells to Reford & Dillon a lot of land on Sherbrooke street, cadastral No. 1,716, St Antoine Ward, for the price of $23,856.00, where of $3,856 were paid, and the balance of $20,000 was payable to the Vendor in 10 years with interest for which a *Bailleur de fonds* hypothèque was reserved.

The Vendor transferred this balance to The Royal Institution for the advancement of learning, who transferred it to James Cunningham of Ottawa, gentleman.

On the 12th November, 1873, Reford & Dillon sold this property to Geo. B. Burland for $37,077.97½ whereof $5,077.97½ were paid, and the balance of $32,000 the purchaser undertook to pay as follows, $20,000 to the exoneration of the Vendor, to The Royal Institution for the advancement of learning at that time the Transferees and holders of Peter Redpath's claim as Vendor of this property to Reford & Dillon ; and the

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balance of $12,000 in two years with interest, for which sums a *Bailleur de fonds* hypothèque was reserved by Reford & Dillon.

On the 14th November, 1873, Burland exchanged this property with the Gentlemen Ecclesiastics of the Seminary for a lot on St. Catherine street, part of cadastral No. 1,654, St. Antoine Ward. Burland agreed to give by way of boot *soulte ou retour* a sum of $10,235.90, payable in the annual Instalments with interest, for the payment whereof they limited their hypothèque to a part only of the property by them given in exchange, liberating a part, but in as much as the property received in exchange was charged with a *bailleur de fonds hypothèque* in favor of the Transferee of Redpath, and a further sum of $12,000 in favor of Reford & Dillon, both being mentioned as a balance of $32,000 due under Reford & Dillon's Deed to Burland, it was stipulated in the exchange that the limitation by the Ecclesiastics of their hypothèque for the *soulte* was without prejudice to their recourse or right of hypothèque by way of warranty on the land they so conveyed, for securing them against the said sum or balance of $32,000, which it was thereby declared, the said Burland owed in virtue of said sale by Reford & Dillon to Burland, and to the amount of which sum of $32,000 the land they conveyed to Burland was thereby declared to be specially affected and hypothecated in their favor, for surety of the payment of the said sum by Burland.

On the 29th of May, 1874, Burland sold the St. Catherine street property to Ross, Smith & Starke, the Vendor declaring the property free and clear of encumbrances, save the *soulte* of $10,235.00 and interest, which was assumed by the purchasers, and also a hypothèque *en garantie* created by the said exchange, for a balance or remaining sum of $20,000, which the purchasers promised to discharge.

The price was $35,740 whereof $5,505 was paid as part thereof.

Other part thereof $10,235, the purchasers promised to pay in discharge of the Vendor Burland, to the Ecclesiastics of the Seminary of St. Sulpice the now Respondents, being the amount declared payable to them by said exchange, at the times, and in the manner therein stated, and the balance of $20,000 to the exoneration of Burland (the Vendor), to The Royal Institution for the advancement of learning.

The Gentlemen Ecclesiastics intervened and became parties to this Deed, accepting the purchasers in lieu and stead of Burland, for the payment to them of the *soulte* or *retour* of $10,235 and interest, and for the discharge to the exoneration of the said Ecclesiastics of the said hypothèque for $20,000 and interest payable to The Royal Institution and affecting said lot 1716, St Antoine Ward, for guaranteeing the payment whereof the property thereby sold was hypothecated to the said Gentlemen Ecclesiastics, being a balance then still due of the larger sum of $32,000, the whole however without novation, and without any derogation to the hypothecs then subsisting in their favor, but discharging said Burland from all personal responsibility in their favor.

On the 4th March 1880, Cunningham sued the Gentlemen Ecclesiastics hypothecarily for the payment of $2,100 for three annual Instalments of interest due on the 1st January 1880.

The Respondents, the Gentlemen Ecclesiastics paid the amount sued for with costs, and another half yearly instalment of interest due 1st July 1880, and took a Notarial Discharge executed before Lafleur, Notary, 25th June 1880, claiming subrogation of Cunningham's rights against Reford & Dillon, the Appellants, in conformity with § 2 of Article 1150 C. C.

These facts were submitted to the Superior Court at Montreal, in a suit brought by the Respondents the Gentlemen Ecclesiastics against the Appellants Reford & Dillon for the amount they the Respondents were thus obliged to pay to Cunningham. The Appellants' pretentions were overruled and judgment given for the Respondents, which judgment is now appealed from.

I think the Respondents neither had the power, nor did they pretend to discharge the recourse of the Appellants against Burland, for the payment to their exoneration of the money due to Redpath, transferred to The Royal Institution, and from them to Cunningham. In the exchange of the 14th November 1873, the Respondents conveyed to Burland an unencumbered property, and received in exchange one incumbered by a liability to The Royal Institution, or to Cunningham. To prevent their position being seriously affected by the encumbrance, they exacted from Burland, that

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the property he received, should remain hypothecated in their favor for the sum requisite to protect them against that encumbrance. Burland never was their personal debtor for this sum, and the hypothèque could only have availed them in case of an hypothecary action brought against them by Redpath or his successors. They discharged Burland from personal claims, but not from this, as it was only on the land and against the land they had parted with, and when that land passed to another, they preserved their hypothèque and claims against the land and against Burland's successor the holder of the land, in respect of the obligations which Burland had undertaken towards them, but no other. Their own personal demand against Reford & Dillon, arose from the fact, and from the time, that they paid Cunningham as successor to Redpath, against this demand, Burland is not discharged nor his liability as *garant* of Reford & Dillon in any manner interfered with. What Burland undertook to pay in discharge of Reford & Dillon is still Burland's debt, and is primarily Reford & Dillon's debt, as by them undertaken to pay to Redpath.

By the exchange between Reford & Dillon and the Seminary, each party in theory was supposed to receive an equivalent for what he gave, and if both properties had been free of charges and of equal value, no obligation would have remained to be fulfilled on either side. The Gentlemen of the Seminary gave a property free of charges and of superior value, they on their side fulfilled and more than fulfilled their obligations. Burland on his part gave a property of less value and encumbered with a personal obligation of his part as well as an hypothecary liability towards Reford & Dillon. By putting this property into the hands of the Gentlemen of the Seminary, the hypothecary charge remained attached to it, but it did not in any manner make the debt and personal liability of Burland to Reford & Dillon the debt of the Gentlemen of the Seminary. It remained the debt and personal liability of Burland, although the property which had become the property of the Gentlemen of the Seminary continued to be liable for it. The Gentlemen of the Seminary were not the debtors, and what is more important, they never were the creditors of this claim, and therefore could not discharge it.

In allowing the valuable unencumbered property which they held, to pass out of their hands, in return for one that was encumbered and of less value, they took the necessary and reasonable precaution of stipulating that for their warranty, and to protect them against the hypothecary claims that might fall upon the property that had passed to them, they should have a hypothec upon the unencumbered property they had parted with, as well as a hypothec for the *soulte* or *retour* which they were to receive; the latter being all the amount for which they were actually creditors; the former being an amount they had no claim to, but which might come against their new property, if Burland failed to fulfil his obligations by paying his own, not their debt, nor being a debt for which they were a direct creditor. When Burland sold to Smith & al, the property he had received from the Seminary, Burland was their personal debtor for the amount of the *soulte* or *retour* which was his own debt, and one for which they were the direct creditors. Burland had besides come under obligations to them to pay his own debt to Reford & Dillon, and to see that it did not fall back upon the property he had put into the hands of the Gentlemen of the Seminary; their claim upon him was limited to enforcing these two obligations. These they could discharge and no more; they could not discharge the debt which Burland owed to Reford & Dillon, for they the Gentlemen of the Seminary did not own that claim and had no control over it. What personal claims against Burland did they then discharge in becoming a party to the deed to Smith & al and signing the Release in the terms therein mentioned? They discharged 1st their personal claim against Burland for the sum due by him to themselves for the amount of the *soulte* or *retour* he had undertaken to pay them, and they discharged in the second place, the new obligation which he had contracted in their favor, to hold them harmless against his own debt to Reford & Dillon; but they did not nor could not discharge him Burland from his own debt which he Burland then owed and continued to owe Reford & Dillon. To the extent thus explained, and to that alone, did the Gentlemen of the Seminary discharge Burland personally, contenting themselves with the right to follow hypothecarily the property which he Burland had transmitted to Smith & al, and accept-

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ing Smith & al in place of Burland, for the personal obligations of Burland to them, of the nature and extent above explained.

When the Gentlemen of the Seminary were called upon hypothecarily to pay part of the debt of Burland, primarily the debt of Reford & Dillon, they were required to pay something that they had never owned or discharged, and by paying it, and claiming subrogation, new relations arose between them and Reford & Dillon. By force of the subrogation to which they were entitled, they from thenceforth became the creditors of Reford & Dillon and had a right to call upon them for reimbursement; hence their present action, to which I hold they are fully entitled, and the judgment they obtained for it in the Superior Court should be confirmed; and this being the opinion of the majority of the Court said judgment is consequently confirmed.

Ramsay, J., dissenting. Judgment confirmed.

GIROUARD, WURTELE & MCGIBBON, *for Appellants.*

S. BETHUNE, Q. C., Counsel.

GEOFFRION, RINFRET & DORION, *for Respondents.*

MONTRÉAL, 27 SEPTEMBRE 1882.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 370

ANDRÉ LAPIERRE,

Défendeur en Cour inférieure.

APPELANT.

&

THÉOPHILE LAVIOLETTE,

Demandeur en Cour inférieure,

INTIMÉ,

Acte des Elections de Québec, 1875.

L'Appelant est poursuivi sous l'autorité de cet acte pour avoir, le 29 décembre 1880, veille de la votation dans le comté de Berthier, pour l'élection d'un député à l'Assemblée législative de Québec, engagé un nommé Hétu pour aller, le lendemain à Montréal, chercher un voyage de marchandises, ce voyage n'étant, de la part de l'Appelant, qu'un prétexte pour empêcher Hétu de voter. A l'enquête l'Intimé a fait entendre un certain nombre de témoins pour prouver quelle avait été la conduite de l'Appelant en cette circonstance envers d'autres électeurs du comté de Berthier.

JUGÉ: Que cette preuve est légale et que le jugement de la Cour de première instance, qui a accordé à l'Intimé les conclusions de sa déclaration, doit être confirmé. (Dorion, J. C., et Ramsay, J., diss.).

CROSS, J.—Laviolette sued Lapierre for infraction of the Quebec Election Act of 1875, 38 Vic. cap. 7, sec. 249 and 255, claiming a penalty of $200 or in default of its payment that Lapierre should be imprisoned for six months, for having on the 29th December 1880, in the Parish of St. Antoine de Lavaltrie, in the County of Berthier, paid one Adrien Hétu, the sum of $6 in order to induce him to abstain from voting at an election to take place on the next day, the 30th December 1880, to choose a member to represent the County of Berthier in the Legislative Assembly, for the Province of Quebec; the said Adrien Hétu being at the time an Elector entitled to vote and having been actually by said means prevented from voting at said election.

Lapierre pleaded a *défense en fait.* The parties made their proof and were heard. On the 16th May 1881, the Superior Court gave judgment awarding Laviolette's conclusions.

Lapierre now appeals on the law and the facts of the case.

Section 249 of the Quebec Election Act of 1875, 38 Vic. c. 7 covers more ground; it includes a variety of cases but leaving out the words inapplicable to the present case, it would read as follows:

" The following persons shall be deemed guilty of bribery " and shall be punished accordingly.

" Every person who directly or indirectly by himself or " any other person, on his behalf gives, lends or agrees to " give or lend, or offers, or promises any money or valuable " consideration, to or for any elector, or to or for any person " on behalf of any elector, or to or for any person in order " to induce any elector to vote or refrain from voting, or " corruptly does any such act as aforesaid on account of such " elector having voted or refrained from voting at any " election."

It appears that there were two candidates, Louis Sylvestre, a liberal, supported by Lapierre and other friends, and Joseph Robillard, a conservative, supported by Adrien Hétu and others.

Adrien Hétu was a witness for Laviolette, the Plaintiff in the cause. He proves that on the 29th December 1880, Lapierre paid him six dollars, to proceed to Montreal the following day, the 30th December 1880, being the day of the election, to bring from thence to St. Antoine de Lavaltrie, a load

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of merchandise for Lapierre, who gave him a letter to take to one Leclerc, a merchant in Montreal, who was to give Hétu his load ; nothing was said about the election and Hétu says he considered himself free to vote, nevertheless he went early next morning being at seven o'clock to Montreal, and did not vote. It was thus established that he was paid $6 under an engagement to bring a load of merchandise from Montreal, which if it were the real object of his engagement and so established, would have been perfectly legitimate. Laviolette depended as well upon the evidence of Hétu as of others to prove that bringing a load was a mere pretext and that the real object was to prevent Hétu from voting.

Adrien Hétu begins his statement by declaring that his brother in law, Jean-Bte. Hétu, had been first engaged to go next day to Montreal for a load for Lapierre, he says : " Le mercredi soir, je suis allé chez mon beau-frère, Jean Bte. Hétu, il m'a dit qu'il était engagé pour aller à Montréal, par M. Lapierre. J'ai dit que pour $5 j'irais aussi. M. Lapierre est arrivé et mon beau-frère lui a dit, en voici un, en me désignant, qui est prêt à s'engager comme charretier pour Montréal, M. Lapierre m'a dit que c'était bien, et m'ayant demandé combien je demandais, je lui dis que c'était $6 qu'il me paya de suite, à condition que le voyage de marchandise ne serait pas une tonne de melasse, mais une charge de mille livres. M. Lapierre me fit une lettre pour avoir cette charge à Montréal chez M. Dupuis, chez lequel je suis allé, et qui ayant lu la lettre me dit, espérez je vais vous donner votre charge, ce qui m'a surpris vu que je n'avais pas ma voiture, et il m'a donné un paquet de fil pesant quatre livres environ, et m'a dit que c'était là ma charge. Je suis parti le matin de la votation et je ne suis revenu que le lendemain matin ainsi que c'était convenu. Je suis parti le matin vers neuf heures.

Quand les messieurs Dupuis m'ont donné ce paquet de fil, je me mis à rire pensant que M. Lapierre m'avait envoyé là pour m'empêcher de voter, et M. Dupuis ou un commis a écrit sur le paquet " paquet de mille livres."

Il y a dix lieues de Lavaltrie à Montréal, et deux lieues de chez M. Lapierre à la gare du chemin de fer du Nord à Lavaltrie, ce chemin va à Montréal. C'est le voyage qui m'a empêché de voter, et j'aurais voté n'eût été ce voyage, mais j'étais libre de voter. "

It is proved that from $2.50 to $3 is the customary charge paid at Lavaltrie to bring a load of merchandise from Montreal. André Lapierre & T. Laviolette.

So much having been established, it became a question whether evidence could be given of Lapierre's conduct at the time in otherlike cases, to shew the intent with which the money was paid to Hétu.

Objection was regularly taken to this evidence which was however admitted under reserve, and it seems to have been part of the evidence on which the Court below decided the case, because by the final judgment the objection was overruled.

To my mind, that evidence was properly received, see 1 Taylor, On Evidence, § 317, and the majority of the Court are of that opinion.

This difficulty being got over, let us see what this proof amounts to.

I. Prudhomme says : " Le défendeur est venu chez moi pour m'engager, pour aller à Montréal, pour aller chercher un baril de whiskey, sur mon objection à faire ce voyage, le Défendeur a insisté et m'a mis $4 dans la main en me disant qu'il fallait que j'y aille. J'ai dit je n'aime pas à m'absenter pour la journée de demain ; par rapport à la votation, dit-il, et je dis oui ; alors il a dit que je ne devais pas m'occuper de cela parce que ces beaux messieurs-là ne s'occupaient pas de nous et que je devais gagner de l'argent, et m'ayant donné une piastre en sus des quatre piastres qu'il m'avait données je consentis.........

Le matin de l'élection, je suis parti de chez moi vers neuf heures ou passé neuf heures. Le Défendeur m'ayant vu avec ma voiture, il m'a appelé et m'a reproché de n'être pas parti de grand matin. Je lui dis qu'il ne m'avait pas engagé pour partir matin, que j'avais le temps de faire le voyage et revenir assez vite, et que l'heure n'avait pas été fixée. Il ne dit rien là-dessus, mais me demanda si j'allais arrêter voter en passant, je lui ai dit que oui, et alors il me dit que je n'avais pas à aller à Montréal, puisque je votais. Sur quoi je lui dis qu'il me surprenait bien, qu'il n'avait pas été question la veille que je ne voterais pas, et que je ne voudrais pas pour $20 ne pas voter, sur quoi il dit qu'il était vrai qu'il n'en avait pas été question, mais que j'aurais bien dû m'en douter et comprendre que j'aurais dû faire comme les autres et partir de bon matin."

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Pierre Lacombe.—" La veille de la votation, le Défendeur est venu chez moi m'engager pour aller à Montréal, chercher une charge le lendemain, jour de l'élection ; je lui demandai $2.50 pour faire ce voyage, et il m'a dit que c'était bien, et il m'en a donné $4, et je ne lui ai rien remis. Il m'a remis une lettre pour aller chez Leclerc, où j'eus une charge de marchandise de 890 ou 900 livres." In cross examination. "C'est lorsque nous avons été chargé à Montréal, mon frère et moi, le jour de l'élection, que nous avons dit qu'il pourrait se faire qu'il nous avait empêché, de voter en nous engageant, et qu'il nous avait engagés pour cela."

O. Lacombe.—" Le Défendeur est venu chez moi pour m'engager, pour aller à Montréal, pour chercher une charge. Il m'a offert $5. Je dis qu'il était impossible que j'y aille."

Pierre Poliquin.—" La veille de l'élection, je fus chez le Défendeur qui me demanda si je pouvais aller à Montréal, et je lui dis que je ne pouvais y aller...... Il m'a offert $5 pour le voyage ; c'était pour aller chercher une boîte de cadenas (proved by another witness to weigh about 100 lbs) ou une boîte de couplets de fer."

Siméon Martineau, says : En réalité il y a quatre électeurs considérés conservateurs, qui sont allés à Montréal, engagés par le Défendeur et qui n'ont pas voté." and all those already above specially mentioned as engaged or attempted to be engaged, are proved to have been conservatives.

It appears that Lapierre himself voted, altho he pretended to take no interest in the election.

Adrien Hétu is admitted to have been an elector. Before he engaged to go to Montreal, I. Giguère, an elector proposed to pair with him so that neither would vote, but he refused, on the morning of the election he proposed to Giguère to pair which the latter refused.

With such proof, the majority of the Court are of opinion that the Judge of the Superior Court was warranted in overruling Lapierre's objection to the evidence offered to shew his intent in paying said six dollars to Adrien Hétu, on the 29th Dec. 1880, and in finding as he did that the engagement to bring a load of merchandise from Montreal to Lavaltrie, was only a pretext for such payment, and that the real object of such payment was to induce the said Adrien Hétu not to vote at the said election, which was to take place and

did take place the next day. We therefore confirm the judgment rendered in this cause, by the Superior Court, on the 16th May 1881, granting Laviolette his conclusions with costs of both Courts.

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DORION, J. C.—L'appelant est accusé d'une offense que la loi déclare être un *misdemeanor*. Il fallait, pour le faire condamner, la même preuve que s'il eût été poursuivi devant une cour criminelle, or il est prouvé que lorsque l'appelant a engagé le nommé Adrien Hétu pour aller à Montréal, il n'a pas été question d'élection, ni qu'il ne voterait pas, et il ne l'a pas même engagé pour aller à Montréal le jour de l'élection. Si Hétu est allé à Montréal le jour de l'élection et avant de voter, c'est de son propre mouvement, ou plutôt à la suggestion d'un de ses parents, qui y allait aussi. L'on a présumé que l'appelant avait eu l'intention d'empêcher Hétu de voter, et pour cela on l'a condamné a payer $200 d'amende ou à aller six mois en prison. Je ne trouve pas cette preuve suffisante et je renverserais le jugement.

RAMSAY, J.—I would also reverse the judgment. The proof is of the most vague and uncertain kind. The appellant is punished not for having committed an act prohibited by law, but for an intention of doing so. The act of having a carter to go to Montreal or any where else is perfectly legitimate, and it was for the Respondent to prove that it was done under circumstances which would bring the contract under the prohibition of a most exceptional law. This he has not done.

Jugement confirmé.

PICHÉ & MOFFATT, *pour l'Appelant.*

MATHIEU & GAGNON, *pour l'Intimé.*

MONTREAL, 20 NOVEMBRE, 1882.

Coram DORION, Juge en chef, MONK, RAMSAY, TESSIER & CROSS, Juges.

No. 52.

JOHN MACKINNON.

Défendeur en 1ère Instance.

APPELANT;

ET

STEPHEN THOMPSON.

Demandeur en 1ère Instance.

INTIMÉ.

JUGÉ : Qu'il est loisible à un fabriquant ou à toute personne fesant un commerce quelconque, qui vend son fonds de commerce avec l'achalandage de l'établissement (*good will*), de céder par le même contrat à l'acquéreur le droit exclusif de se servir de la marque de fabrique et du nom de l'établissement, lors même que ce nom est celui du vendeur, qui ne peut après cette vente faire usage de la même marque ou du même nom pour continuer le même négoce, de manière à faire une concurrence dommageable à l'acquéreur.

L'Appellant, fabriquant de biscuits, à Saint-Henri, a vendu à l'Intimé, en 1876, tous ses biens meubles et immeubles, son fonds de commerce avec l'achalandage de son établissement (*good will) et tous les avantages découlant de son nom* et de ses affaires, y compris les dettes, réclamations et demandes de quelque nature qu'elles fussent, n'exceptant que ses meubles meublants et les effets à son usage personnel.

L'Intimé a de suite pris possession de l'établissement de l'Appellant et à continué à y fabriquer des biscuits, en se servant de sa marque de commerce qui consiste dans une tête de sanglier avec le nom de MacKinnon, et il a fait enregistrer cette marque de commerce comme lui appartenant.

L'Appelant ayant recommencé à faire des biscuits s'est servi de son ancienne marque de commerce et l'Intimé a pris un bref d'injonction pour lui défendre de le faire.

La Cour de première Instance a renvoyé la demande de l'Intimé, parce que l'Appelant ne lui avait pas cédé le droit exclusif de se servir de son nom et de sa marque de commerce et qu'en supposant qu'il l'aurait fait, il ne pouvait céder le droit exclusif de se servir de son nom à un tiers, et qu'enfin l'Intimé n'avait pu acquérir, soit par l'usage ou par enregis-

trement, le droit de marquer les biscuits qu'il fesait comme s'ils avaient été faits par l'Appelant. John MacKinnon & S. Thompson.

La Cour de Révision a infirmé ce jugement et a fait défense à l'Appelant de se servir de la marque de commerce qu'il avait cédée à l'Intimé.

Dorion, J. C.—Nous croyons que ce dernier jugement doit être confirmé.

Il est loisible a tout commerçant de vendre son fonds de commerce et tout ce qui constitue son établissement y compris l'achalandage, sa marque de commerce et le nom de l'établissement, en un mot tout ce qui peut donner de la valeur a cet établissement. Ce sont là des valeurs et une propriété dont il peut disposer. C'est ainsi qu'en France et en Angleterre, mais surtout en France, des maisons de commerce continuent leurs affaires, sous la même raison sociale et la même marque de commerce, longtemps après que les fondateurs ont cessé d'en faire partie et lors même qu'il n'existe plus dans la maison personne du même nom.—Nous en avons aussi des exemples dans le pays, quoique cela y soit moins fréquent qu'ailleurs.

Si quelqu'un par son travail et son industrie donne une valeur additionnelle à un établissement qu'il a fondé ou continué, rien ne s'oppose à ce qu'il profite du résultat qu'il a obtenu, soit en continuant lui-même l'exploitation de cet établissement, ou en le cédant avec tous les avantages qui y sont attachés, pour en obtenir la plus haute valeur. Un établissement commercial ne consiste pas seulement dans les articles de commerce qui sont dans l'établissement,mais encore dans le local, la clientèle ou l'achalandage, le nom, tout ce qui est compris dans le terme anglais *good will*, qui n'a guère d'équivalent dans la langue française.

Nous avons décidé dans la cause de *Moss* & *Silverwain*, jugée en septembre, 1874, que l'Appelant qui avait cédé à l'Intimé son établissement de prêteur sur gage, avec promesse qu'il ne ferait plus à l'avenir ce commerce dans la cité de Montréal, n'avait pas pu, au mépris de cette convention, ouvrir un autre établissement, à Montréal, ou il fesait d'une manière indirecte le même commerce.

Nous avons également décidé dans la cause de *Findlay* &

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McWilliam, jugée en juin, 1875, que McWilliam, qui avait vendu à Findlay sa part dans leur établissement de commerce, y compris le *good will* de la maison, n'avait pas pu établir dans le voisinage une maison fesant le même commerce, en se représentant " comme ci-devant Findlay & McWilliam."

Nous avons par conséquent reconnu que ces contrats étaient légitimes et emportaient des conséquences qui limitaient le droit des cédants de faire à leurs cessionnaires une concurrence indue et contraire soit à la lettre, comme dans le cas de Moss & Silverwain, ou à l'esprit de leurs conventions, comme dans le cas de Findlay & McWilliam. Ces décisions s'appuient de précédents nombreux tant en France qu'en Angleterre.

Devilleneuve & Massé, *Dict. du Cont. commercial*, *Vo. Fonds de commerce Nos* 3—4 ; les mêmes, *Vo. Enseigne Nos* 6 *et* 7, citent les arrêts rendus en France ; et dans Smith's Leading cases, vol. 1, p. 406, Mitchel & Reynols, se trouvent la plupart des décisions rendues en Angleterre.

Devilleneuve & Massé, Vo. Marque de Fabrique ou de commerce, No. 58, s'expriment ainsi :—" Les marques de fabrique " et de commerce peuvent être cédées selon les règles du " droit.—Du reste, la cession de l'établissement industriel ou " commercial *emporte de plein droit celle de la marque de com-" merce*, à moins de stipulation contraire."

" En principe, l'acheteur d'un fonds de commerce a le droit " de conserver le nom du vendeur sur son enseigne, sur ses " prospectus, étiquettes &c., pour indiquer qu'il est son suc-" cesseur et s'assurer la continuation de sa clientèle."

Rendu, Marques de Fabrique No. 100, dit : " La marque " d'une fabrique peut être cédée soit isolément soit concur-" remment avec le fonds de commerce lui-même."

....

" Il résulte que la cession de l'établissement faite en termes " généraux emporte de plein droit (sauf une restriction re-" lative au nom dont il sera parlé ci-après) la cession de tous " les avantages particuliers qui s'y rattachent et notamment " la faculté de se se servir de la marque."

Le même auteur, au No. 411, dit encore : " Celui au profit " duquel la transmission a eu lieu (héritier ou cessionnaire,) " est le seul qui, en vertu des règles ci-dessus développées, ait " le droit de se sevir du nom dans la même industrie, sous

" les réserves indiquées d'après les dernières décisions de la " jurisprudence (No. 407)."

Ainsi, d'après la doctrine et la jurisprudence françaises, la cession d'un fonds de commerce emporte avec elle l'achalandage, les marques de commerce et même le nom de l'établissement, lorsque ce nom n'est pas celui du vendeur, lorsque le nom de l'établissement est celui du vendeur, l'acquéreur a le droit de se représenter, sur son enseigne, ses étiquettes et sa correspondance comme " successeur de son cédant." Une telle vente entraîne avec elle l'obligation de la part du vendeur de ne pas former dans le voisinage immédiat un établissement semblable à celui qu'il a vendu, et en cela le droit français est plus exigeant que le droit anglais qui permet au vendeur de former de suite un autre établissement à moins que la vente ne contienne une disposition expresse à cet égard. Mais soit d'après le droit français ou d'après le droit anglais, il est permis de stipuler que l'acquéreur pourra conserver le nom de l'établissement, lors même que ce nom est celui du vendeur et dans ce cas le vendeur ne peut former un établissement semblable dans la même localité ou dans un rayon convenu, dont l'étendue ne peut être indéfinie, mais qui doit être règlée d'après le genre d'affaires, de manière à ce que le nouvel établissement ne puisse faire une concurrence dommageable au cessionnaire de l'établissement vendu.

Il n'est pas permis à un commerçant de céder son nom, de manière à s'interdire *le droit* de le porter à l'avenir ou de faire sous ce nom aucun genre d'affaires, pas plus qu'il ne lui est permis de stipuler qu'il ne fera plus d'affaires dans le pays. Cela serait contre l'intérêt général et l'ordre public. Mais puisqu'il est permis à un négociant qui vend son fonds de commerce qu'il n'établira pas un autre établissement semblable qui puisse faire concurrence à l'établissement vendu, l'on ne voit pas pourquoi il ne pourrait pas permettre au cessionnaire de se servir de son nom relativement aux affaires dépendant de l'établissement cédé. Cela n'empêcherait pas le vendeur de faire, sous son nom, au même endroit, et même avec la même marque un autre genre de commerce, qui ne ferait aucune concurrence à celui de l'acquéreur, tout en assurant à celui-ci tous les avantages découlant de l'achalandage, de la marque de fabrique et du nom de l'établissement qu'il aurait acheté.

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Quoiqu'il puisse y avoir quelque différence d'opinion relativement au droit que l'acquéreur peut avoir de se servir du nom du vendeur d'un établissement commercial, lorsque l'acte de vente ne contient aucune stipulation à cet égard, il ne paraît y en avoir aucune, si les parties à l'acte ont réglé ce point affirmativement. L'on peut encore consulter sur ce point Gastambide, des Contrefaçons No. 445, Devilleneuve & Massé—Vo. Nom industriel No. 25 bis.—Troplong, vente Ed. Belge.—No. 323, §. 5, note 5 de l'Editeur Belge—*Bury* & *Bedford*, 10 jurist, 503.

Cette stipulation équivaut a un engagement de la part du vendeur de ne plus faire le même commerce, ce qui comme nous l'avons vu est un engagement valable—et dès lors il n'y a plus aucune raison pour ne pas permettre à l'acquéreur de continuer son commerce sous le nom du vendeur.

Dans la cause de *Churton* et al & *Douglas* (5 Jurist. N. S. 887,) le vice Chancelier Wood, (depuis Lord Hatherley) énonça comme suit les droits de l'acquéreur du *good-will* d'un établissement commercial : " Upon a sale, good-will means every positive advantage (as contrasted with the negative advantage of the vendor not carrying on the business himself) which has been acquired by the vendor's firm in carrying on its business, every thing connected with the premises or the *name* of the firm, and every thing connected with, or carrying with it the benefit of the business; but it does not follow that the purchaser has a right to use the name of the vendor's firm simpliciter.

And at p. 890. It may be that the good-will of a business is parted with, together with the right of representing the vendor to the world as carrying on the very business. But it may also be that the license of using the simple name of the vendor used in the firm *is not sold:* Inconvenience might naturally result to M. John Douglas from having his name so exposed and therefore it was very reasonable and not in the least inconsistent with their case that the Plaintiffs should apply to him for leave to call themselves John Douglas & Co simpliciter.—That it is said he declined. But he was aware of their calling themselves " successors to John Douglas & Co," or " late John Douglas & Co," that is to say that they identified their house of business as the house of business formerly carried on by John Douglas & Co. That I apprehend

they were entitled after the sale of the good-will, and after the sale of the good-will, no one else had a right to do so. Certainly the Defendant had not the right, the name had become a known name, and the Defendant himself having assigned over the good-will, was not entitled to represent himself to the world as carrying on that business which had been carried on by John Douglas & Co."

Cette décision établit deux choses 1o. qu'il était loisible au Défendeur John Douglas de céder la raison sociale de la maison John Douglas & Cie en cédant le *good-will* de l'établissement. 2o. que quoiqu'il n'eut cédé que le *good-will* sans céder le nom social, il ne pouvait pas empêcher les Demandeurs de se représenter comme étant les successeurs de John Douglas & Cie et que lui-même n'avait aucun droit de se servir de ce nom. Les tribunaux français ont jugé dans le même sens dans une cause de Compère & Bajou citée par l'Intimé et dont les détails se trouvent dans le rapport du jugement de la Cour de Révision (21 L. C. J., p. 355.)

Ainsi, tant par le droit français que par le droit anglais, il est reconnu que celui qui vend son fonds de commerce, peut en même temps céder le droit de se servir du nom de l'établissement, lors même que ce nom serait le sien propre, et que lui-même n'a pas le droit de faire en son nom le même genre d'affaires de manière à faire croire qu'il continue les affaires de l'ancien établissement, ou à créer quelque confusion sous ce rapport.

Dans l'espèce l'Appelant à expressément vendu l'établissement, le *good-will*, le nom et tous les avantages qui en découlaient, et d'après les autorités ci-dessus il ne lui est plus loisible de faire le même commerce sous le même nom, ni de se servir de la même marque. Il y aurait eu plus de difficulté, si le nom n'avait pas été cédé, mais sans préjuger cette question il nous suffit de dire que le droit des parties a été réglé par leur contrat. Je n'attache aucune importance à l'enregistrement que l'Intimé a fait de sa marque de commerce. Cet enregistrement ne pouvait lui conférer aucun droit à cette marque, surtout à l'encontre de l'Appelant, s'il n'en avait déjà été propriétaire par l'acquisition qu'il en avait faite.

Le jugement de la Cour de Révision qui a fait défense à l'Appelant de se servir de la marque de commerce dont l'Intimé a seul le droit de se servir doit être confirmé.

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CROSS, J.—This is an action of damages brought by Thompson against MacKinnon for breach of contract in regard of the good-will of a business sold by MacKinnon to Thompson.

Thompson alleges that by notarial Deed executed on the 25th July, 1876, MacKinnon, a biscuit manufacturer, sold to him Thompson, MacKinnon's stock in trade at St. Henry with the good-will and all the advantages pertaining to the name and business of him, MacKinnon, which incuded a trade mark, label and business device, consisting of the word "MacKinnon" and the representation of a boar's head grasping a bone in its jaws contained in a white eliptic band, with other particulars unnecessary to be mentioned, printed on labels used in the manufacture of his biscuit and stamped upon the biscuits of his manufacture, which mark Thompson had procured to be registered in August, 1876, under the Trade Mark and Design Act.

MacKinnon, knowing that he, Thompson, was the proprietor of said trade mark and designation had nevertheless, in violation of right and of the act, made use of it in a manufactory of biscuits which he had set upon his own account, thereby causing Thompson damage for which he claimed $5,000.

MacKinnon pleaded, that long prior to the sale he had acquired renown as a biscuit manufacturer, from diligence and the use of special and peculiar recipes, wherby biscuits of his manufacture brought a higher price than those of other manufacturers, and his name came to be and was a trade mark having a special commercial value to him over and above the ordinary good-will of his business; that he had long used the device and trade mark including the word "MacKinnon's" his own name on the labels, packages and biscuits; that he had not by the Deed in question transferred the use of his name or the said trade mark in connection with it; that the use of the trade mark by Thompson as he had been doing was fraudulent and a usurpation of MacKinnon's rights, who was solely and exclusively entitled to use the trade mark in question as being personal to him, consisting of his own name and what was merely incidental to it.

Thompson replied that the renown of MacKinnon's biscuits dit not depend on any thing peculiar in the manufacture nor the recipes used, but on the length of time the manufactory had been established; that the Deed transferred to him,

Thompson, the good-will of the business and all advantages to be derived therefrom, from the name and business of the Defendant MacKinnon and the estate generally with all appurtenances, attributes, adjuncts and every thing in any way connected with or appertaining to the manufacture and business heretofore carried on by MacKinnon.

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In the same suit Thompson petitioned for an injunction to restrain MacKinnon from the use of the trade mark and of labels containing it.

Issue was joined on this petition substantially in the same manner as had been done on the principal action, and evidence was taken on both, Judge Papineau having ordered that they should be both heard together.

The sale referred to in the pleadings was produced. It was in fact a liquidation of MacKinnon's business with the consent of his creditors, he being insolvent. They were represented in the deed, and accepted this consideration of the sale in discharge of MacKinnon's liability to them.

It was by the evidence, among other points unnecessary to be noticed, established that the trade mark, labels and stamps for the biscuits had been long in use by MacKinnon before he sold to Thompson; that Thompson used them as part of his purchase from the time he entered into possession; that he got the trade mark registered under the Trade mark and Design act, and MacKinnon's previous registration thereof cancelled by the Minister of Agriculture as interfering with his rights and registration.

Also that MacKinnon had shortly after the transfer set up a similar business in the vicinity, using the same trade mark and labels.

The facts were really not disputed, but MacKinnon contended that what was called the trade mark was simply his own name, which was personal to himself and could not be made the subject of a trade mark, except for himself alone, and could not pass by any sale or transfer, nor the Boar's head, which was the coat of arms of the MacKinnon clan and a mere incident to the name.

The case was heard on the merits before His Honor Mr. Justice Johnson, who, on the 30th April, 1877, in an elaborate judgment dismissed the action for damages and the petition, on the ground that the deed of the 25th July, 1876, did not ex-

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pressly convey the right to use MacKinnon's name and trade mark and that the exclusive use of MacKinnon's name could not be conveyed, nor was such exclusive use acquired by Thompson.

The case coming on in Review, this judgment was by the unanimous voice of the three Judges in Review reversed. MacKinnon was enjoined not to use the labels or trade mark and was condemned to pay Thompson $400 damages and costs.

The validity of this judgment is now in question on the present appeal.

The appellant does not now seem to contend for the broad ground taken in the pleadings, but he makes the following points:

1st It is the manufacturer's name that forms the very essence of the label.

2nd The name was not the appellation of the establishment, but of the manufacturer.

3rd The name in question was not the mere patronymic MacKinnon, but the special personal name John MacKinnon.

The question is not here as to whether Thompson has strictly confined himself within his rights, nor has it been determined that he is entitled to use the name John MacKinnon in connection with his business, unless with some qualification to show that he merely claims to be his successor. The judgment only goes so far as to prohibit him the use of marks or labels with the Boar's head, by distinguishing the manufacture or brand of the biscuits he manufactures as "MacKinnon's biscuit" or any counterfeit or imitation of said marks or brands or of any part thereof.

In answer to the appellant's propositions, it may be said that the good-will and all advantages pertaining to the name and business of the said John MacKinnon, the terms used in the Deed of sale undoubtedly included the trade-mark as part of the advantages pertaining to the business of John MacKinnon thereby conveyed. True, the exclusive use of the name John MacKinnon could not be thereby assigned. Whether in certain cases it was sufficient to authorise its use need not be considered. The labels and marks the use of which is complained of, are simply inscribed or stamped "MacKinnon's Biscuits." The name thus used is not the individual designation of John

MacKinnon the assignor of the rights, but is merely the generic name of the MacKinnon clan; as such there can be no valid objection to its having become a trade mark for distinguishing a particular manufacture of biscuits; much less can the Boar's head be objected to, altho it may be the coat of arms of the MacKinnon clan. I am not aware of any law in this country which would give an exclusive property to a person named MacKinnon, to use the coat of arms of the clan, if even he were a clansman; nor is there any cogent reason why it should not become a trade mark as is was certainly made in this instance, and if so made, it became liable to the laws of trade. There is no doubt that a conveyance of the good-will and business with its accessories includes the trade marks pertaining to it See Adams, on Trade Marks, p. 103; Gastambide, des Contre façons no. 445.

The extent to which the individual name of a manufacturer as a stamp on goods of his manufacture may become a trade mark, and as such may be conveyed with his business, even to the exclusion by himself of the use of a similar stamp to impress his own name was carried very far in the case of *Compère* v. *Bajou*, cited by the Respondent, and noticed in all the modern works on trade marks. It was decided in the Tribunal of Commerce, at Paris in 1854, 6th. February, and was afterwards confirmed in appeal.

A glove maker sold out his business and good-will: he had used to stamp the gloves of his own manufacture a *fac simile* of his signature, which he attempted to do after his sale, but was by the Court prohibited from stamping gloves of his own manufacture even with his own name, as so previously used by him.

Some of the French authorities go to the extent of saying that the sale of good-will implies a convention not to set up a similar business in the neighborhood, altho there may not have been any convention to that effect in the deed of conveyance. See Gastambide, p. 466, no. 479, also a case there cited by him from Dalloz for 1825, Part 2, p. 92, Auger v. Dumont, which in its general features very much resembles the present. Sieur Auger, marchand chocolatier des cours de France, de Russie et d'Autriche, had a shop in the Rue Neuve des Petits Champs on the façade of which were emblazoned, among others the arms of these three great powers, he failed

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and his assignee, with his consent and that of his creditors, sold his establishment " avec toutes les valeurs existantes dans la masse. "

Dumont, the purchaser, took possession and put up his sign as successor to Auger, with the co-operation of the latter, whose services he retained at a salary of 3,000 francs *per annum* and certain additional benefits.

Dumont announced the transfer in circulars to the public which Auger sanctioned by a solicitation from himself inscribed on Dumont's circulars.

After some years had passed, Auger quitted Dumont's establishment and set one up quite near to Dumont for the fabrication of chocolate, on which he put up the armorial bearings of France, Russia etc., and by placards, circulars and advertisements in the newspapers claimed the right to do so, and denounced Dumont's pretension to be his successor as an unjustifiable usurpation.

Dumont brought suit against Auger, claiming, first, the closing of Auger's establishment, 2[nd] the suppression by him of the sign used by him with the amorial bearings of France, Russia etc., 3[rd] the suppression of Auger's placards claiming his right to the ancient business, and denying the right of Dumont, also damages, which demands were all accorded him by judgment of the Tribunal of the Seine, 29[th] May, 1824.

Auger appealed and submitted : 1[st] that the sale of the going establishment dit not include the vendor's personal industry, nor the right of exercising it at his pleasure ; 2[nd] that he who sold a business, un fonds de commerce, could begin and carry on a like business in the same locality without causing a *véritable trouble* to the possession of the purchaser.

The Court of appeals, 29[th] November, 1824, overruled these pretensions and confirmed the Judgment of the Tribunal of the Seine.

This case seems to go much further than would be necessary for the decision of the case now under consideration. It is indeed probable that it goes too far. The editor concludes an appended note by the expression in regard to the questions submitted by Auger to the Court of appeals. " Aucune des propositions qu'il voulait établir n'est ni jugée ni préjugée par l'arrêt. "

The rational rule is probably best laid down in the English

cases Cruttwell v. Lye, 17 Vesey p. 346; Labouchere v. Dawson L. R. 13 Equity p. 322; Leggott vs. Barrett 15 L. R. Chan. p. 308 to the effect that where there was no convention to the contrary, a seller of a business and good will could establish a similar business in the neighborhood, but would be enjoined from soliciting business from his former customers, but not from dealing with them, if they came to him voluntarily.

Jessel, master of Rolls went further in a case of Ginesi vs. Cooper L. R. 14 Chan. p. 596, holding nearly in the sense of Dumont vs. Auger, that a vendor of a business and good will should be restrained from doing business with his former customers, but this dictum was disapproved of and the correct rule, as already given, established by the decision in appeal in the case of Leggott vs. Barrett.

These cases go further than is necessary to answer the propositions submitted by the appellant in this case.

1st It is not strictly true in fact that the manufacturer's name forms the essence of the label, "MacKinnon" alone, and not " John MacKinnon ", was used in the stamps and on the labels prohibited.

2nd That the name was not the appellation of the establishment but of the manufacturer. The word MacKinnon was the distinguishing mark attaching itself to the manufacture, the mark by which the goods from the establishment had their name and reputation.

3rd The name used as the trade mark and for the labels was the mere patronymic, and not the special personal name of the vendor John MacKinnon.

We are of opinion that the Judgment of the Superior Court should be confirmed. It is therefore confirmed with costs.

RAMSAY, J.—This suit began by an injunction to prevent the appellant using as a trade-mark on biscuits the word " Mackinnon's," under which there was a stamp of a boar's head holding a bone in its jaws. It appears that respondent purchased from appellant his stock-in-trade as biscuit manufacturer, " with the good will and all advantages pertaining to the name and business " of the vendor, appellant, in said business. The appellant, before the sale of the business, used

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the words and stamp as above, and respondent continued to use them after his purchase. Subsequently appellant commenced business as a biscuit manufacturer, and used a stamp precisely like that he used before. Now, two questions arise: First. Did respondent, by the purchase of the good will of the business, *in the term used*, purchase the appellant's trade-mark ? Second. Does the use of the name and the armorial bearings of a family in a trade-mark alter the character of a trade-mark ?

I canot fancy there can be any difficulty as to the first question. The words cover the advantages to be derived from the name and business of the said John Mackinnon, and it is not contended that the stamp and label used were not part of his business.

As to the second question, it has been ingeniously asked—Did Mackinnon cease to have a right to use his own name and the arms af his family ? I think that would be carrying the interpretation rather far, and further than is necessary on this appeal. It is not a question here whether he abandoned the use of his own name and arms ; but whether he can so combine them, as a biscuit baker, as to make a stamp exactly like that of his old trade-mark. And on this point I have not the least hesitation in saying he cannot, and being his own name and arms does not in the least affect the question. If he finds any advantage or satisfaction in the special use of his name and arms, he must combine them in such a way as not to interfere with the trade-mark he has sold. I am to confirm.

Judgment confirmed.

Wotherspoon, Lafleur & Heneker, for appellant.
Butler, for respondent.

MONTREAL, 20 NOVEMRRE, 1882.

Coram DORION, J. C., MONK, RAMSAY, TESSIER & CROSS, J. J.

No. 326.

GEORGE DESROCHES & AL,

Défendeurs en Cour Inférieure.

APPELANTS ;

ET

JOS. GAUTHIER,

Demandeur en Cour Inférieure.

INTIMÉ.

L'Intimé, employé par les Appelants au déchargement de lisses de fer (rails) a bord d'un Steamer, reçut, par suite de la rupture d'une des chaînes qui servait à monter les lisses, une blessure à la jambe qui en a rendu l'amputation nécessaire.

JUGÉ : En infirmant le jugement de la Cour de première instance, que les chaînes fournies par les Appelants étaient suffisantes pour l'usage auquel elles étaient destinées et que l'accident est dû à la négligence de l'Intimé, et non à aucune faute des Appelants.

TESSIER J. (diss.)—En mai, 1880, les Appelants Desroches avaient entrepris le déchargement de lisses de fer (rails) à bord d'un navire à vapeur dans le port de Montréal ; ils engagèrent Gauthier, l'Intimé, un simple journalier à travailler à cet ouvrage, qui s'opérait la nuit comme le jour. Durant la nuit du 26 mai, l'une des chaînes qui servaient à monter ces lisses de fer cassa sans accident pour les hommes, un quart d'heure après une autre chaîne se brisa, mais cette fois les lisses qu'elle montait retombèrent sur Gauthier, qui était au-dessous, au fond de la cale du navire, lui fracassèrent la jambe droite ; il fut transporté à l'hôpital, où les médecins lui amputèrent la jambe audessus du genou, le laissant ainsi infirme pour sa vie.

Ce jeune homme prit une action en dommages pour deux mille piastres, et le 31 mars, 1881, la Cour Supérieure lui accorda $400 de dommages, dans un jugement qui résume si correctement et concisément les faits, qu'il est plus court d'y référer :

" Attendu que le Demandeur réclame des Défendeurs la
" somme de deux mille piastres, pour dommages, résultant
" d'un accident arrivé au dit Demandeur, par la faute des
" Défendeurs, pendant qu'il était à l'emploi de ces derniers ;

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" Attendu que les Défendeurs plaident que le dit accident " est arrivé par la faute du Demandeur et sa négligence ;

" Considérant qu'il est prouvé que le dit Demandeur était " employé par les Défendeurs au déchargement d'un navire " dans le port de Montréal ;

" Considérant qu'il est prouvé que le Demandeur est un " jeune homme sans expérience, travaillant à la journée ;

" Considérant qu'il est prouvé que l'une des chaînes em- " ployées à l'ouvrage que faisait le Demandeur, était plus " petite que les autres chaînes employées pour le même ou- " vrage par lui et par les autres employés des Défendeurs ;

" Considérant qu'il est prouvé que le dit accident est arrivé " pendant que le Demandeur se servait de cette petite chaîne ; " qu'elle a cassé n'étant pas assez grosse et assez solide pour " supporter le poids des rails que l'on soulevait à l'aide de " cette chaîne ;

" Considérant que, même en admettant la théorie des Dé- " fendeurs, que la dite chaîne s'est brisée par suite du fait que " les rails que l'on soulevait et que l'on montait du fond du " navire, n'étant pas convenablement attachés, avaient frappé " un soliveau et ce par la faute du Demandeur et sa négligence " et par suite du fait qu'il n'avait pas obéi aux ordres des em- " ployés des Défendeurs, cette circonstance ne fait pas cesser " la responsabilité des dits Défendeurs, en autant que les " maîtres doivent en loi protéger leurs serviteurs même " contre leur propre imprudence ou négligence ;

" Considérant qu'il est prouvé que par suite de cet accident, " le Demandeur a été obligé de se faire amputer une jambe, " et qu'il a souffert des dommages que la cour évalue à quatre " cents piastres.

" Déboute les Défendeurs de leur exception et les condamne " à payer au Demandeur la dite somme de quatre cents " piastres, avec intérêt de ce jour et les dépens de l'action " telle qu'intentée, distraits etc. "

Il y a ici une appréciation des faits de la preuve par le Juge comme par un jury. D'après la décision de plusieurs causes devant la Cour Suprême, entr'autres celle de Gingras et Désilets, il semble qu'il n'appartient pas à une Cour d'Appel de faire une appréciation contraire, à moins qu'il y ait une erreur évidente et une grande injustice. Ce n'est pas le cas dans cette cause-ci. Les maîtres, les patrons sont des hommes d'ex-

périence dans leur métier, ils prennent au coin de la rue un jeune homme sans expérience pour faire un ouvrage dangereux, ils tombent sous les conséquences de ce principe si bien interpreté par Laurent, vol. 20, p. 518, No. 488.

Geo. Desroches et al. & Jos. Gauthier.

" Laurent, Vol. 20, Page 518, No. 488 : " Il y a presque
" toujours une imprudence à reprocher à l'ouvrier qui éprouve
" un dommage, mais cela ne suffit pas pour affranchir le
" patron de toute responsabilité, si lui-même est en faute, et
" il est en faute, comme le dit très bien la Cour de Lyon,
" lorsqu'il ne prend pas pour la protection de ses ouvriers et
" de ses employés, les plus minutieuses précautions ; il doit
" les préserver de leur propre imprudence. Cette décision pa-
" raîtra d'une rigueur excessive pour le maître, elle est ce-
" pendant aussi juridique qu'humaine ; les ouvriers, incultes
" et impréyoyants, parcequ'ils sont incultes, se familiarisent
" avec les dangers de leur profession, au point qu'ils né-
" gligent les précautions que la plus simple prudence com-
" mande : n'est-ce pas au patron, plus intelligent et plus pré-
" voyant de veiller à leur sécurité et à leur vie ? Trop souvent
" les chefs se contentent de donner des ordres ou de porter
" des défenses sans veiller à l'exécution ; ce n'est pas remplir
" tout leur devoir : l'essentiel est que les ordres soient exécutés
" et que les défenses soient observées. L'entrepreneur d'un
" terrassement intime à ses ouvriers l'ordre de se retirer alors
" qu'il y a imminence d'un éboulement ; il est responsable,
" en cas d'accident, s'il n'a pas veillé à l'exécution de cet ordre
" en protégeant ses ouvriers contre leur propre imprudence."

Cette doctrine est conforme aux articles 1053 et 1054 de notre Code Civil.

Il y a quelque contradiction dans les témoignages, mais cela peut se concilier. Ces chaînes tournaient en apparence sur un pivot commun, d'un coté il y avait trois hommes, de l'autre côté où se trouvait Gauthier, l'Intimé, il n'y en avait que deux. Son compagnon Archambault affirme positivement que la chaîne cassée était plus petite que les autres, que ces chaînes n'ont pas été arrêtées par un soliveau, tandis que les autres disent qu'elles ont été arrêtées par le soliveau, mais l'un deux ajoute : " but coming on night, I could not see " them, there was a tunnel and when night came on I could " not see them."

Il était au contraire très facile pour Archambault de voir

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ce qui s'est passé, parce qu'il était à côté de la victime Gauthier. Archambault jure positivement que deux des chaînes de leur côté étaient plus petites que les autres, et elles ont cassé. Il jure que les chaînes ne se sont pas accrochées.

En admettant qu'il y a quelque contradiction, je crois que l'appréciation de la preuve a été correctement faite par la Cour Supérieure, que la règle de droit appliquée à ce cas est la véritable, et je suis clairement d'opinion de confirmer le jugement.

DORION J. C.—J'ai déjà eu occasion, dans deux causes, de repousser l'interprétation que l'on a cherché a donner ici à ce que l'on désigne en Angleterre sous le nom de *contributary negligence.* D'après cette interprétation, celui qui contribue en quoique ce soit à la cause de l'accident est privé de tout dommage. Une telle règle, si elle existe ailleurs, n'existe certainement pas dans notre droit. Suivant nous, les deux parties peuvent être en faute, et alors il faut distinguer: si c'est la faute de celui qui a souffert qui a été la cause déterminante de l'accident, il ne peut recouvrer de dommages; si, au contraire, c'est la faute de l'autre partie qui a été la cause déterminante de l'accident, cette partie sera tenue des dommages.

Quoiqu'il ait été prouvé que l'Intimé ait certainement agi avec négligence et sans suivre les instructions qui lui avaient été données, je lui aurais donné des dommages, s'il avait été prouvé que les chaînes que les Appelants lui ont fournies n'étaient pas suffisantes pour l'usage auquel on les employait, et pour cette raison, c'est que les Appelants devaient, par leur état, connaître la force nécessaire pour sortir du bâtiment le fer dont il était chargé, tandis que l'Intimé, simple manœuvre engagé à la journée, n'était pas censé le savoir. Les Appelants étaient tenus de fournir des chaînes suffisantes et ils devaient répondre des dommages, si elles étaient insuffisantes. Mais qu'elle est la preuve, c'est que ces chaînes, qui servaient à monter un poids de 1000 lbs, étaient assez fortes pour lever de 5000 à 7000 lbs; que l'employé des Appelants qui surveillait le déchargement du vaisseau a averti l'Intimé qu'il ne devait pas attacher, comme il le fesait, les lisses en fer à l'arrière du vaisseau et les faire traîner comme il le fesait, et que l'Intimé, malgré cet avertissement, a continué à le faire;—que cela a fait vibrer les

lisses qui se sont accrochées à une solive du vaisseau, et comme le dit un des témoins, il fallait que quelque chose cèdât, soit la solive ou la chaîne, et c'est la chaîne qui a cédé.

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Il est remarquable que ces chaînes, qui tournaient sur un pivot, avaient été employées toute la journée, montant alternativement des deux côtés du pivot, les lisses que des hommes placés de chaque coté y attachaient, et que deux fois elles ont cassé et chaque fois du côté de l'Intimé.

Il est prouvé d'une manière concluante, que si l'accident a eu lieu, cela est dû à la manière négligente dont l'Intimé et son compagnon de travail attachaient et montaient les lisses et non à aucune faute des Appelants. Je crois que le jugement doit être infirmé.

Ramsay, J.—This is an action of damages for the alleged negligence of the appellants, stevedores, brought by a laborer who had his leg broken (necessitating amputation), in unloading a ship. The particular negligence insisted upon is that there were two of the chains used in drawing up the cargo, railway iron, smaller than the others; that these smaller chains were unfit for the service, and that the accident happened by the breaking of one of them.

The plea is that defendants had used due care and diligence; that the chains were quite sufficient for the work, and that the plaintiff had, at any rate, contributed to the accident by his own negligence, and that, therefore, the defendants are not liable.

The judgment went for plantiff; and certainly if he was entitled to recover, one can hardly say that the damages were excessive; and perhaps if the judgment had been merely an appreciation of the conflicting evidence of the parties as to negligence, it might not have been desirable to disturb it. But the learned judge in the Court below, to meet the plea of contributory negligence, went further, and gave the following as a motive of his judgment:—

" Considérant qu'il est prouvé que le Demandeur est un
" jeune homme sans expérience, travaillant à la journée."

I cannot concur with the learned judge in his statement of this doctrine, which, as applied, is hardly supported by the somewhat exaggerated view of the law adopted by Laurent.

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On the other hand, the use of the term "contributory negligence" is open to serious criticism. It is one of those terms of the English law which has grown up to serve a practical purpose (if practical purposes are really ever served by inexact expressions); but it is as totally unknown to the French Law, ancient or modern, as it is to the Roman Law. Nay more, the idea it expresses is nowhere recognized in the Roman Law, or in the ancient French law, as a general principle; it is only admitted as a general principle by careful writers under the modern law apologetically, and as an abandonment of strict principle. The older systems do not appear to have considered a joint fault as a possible legal idea. The fault which renders the person guilty of it responsible, is such a fault as determines the result, so that if the person who suffers, by his fault determines the result he must suffer the consequences, no matter how far the other party is in fault.

Properly to understand the question one must bear in mind that it only arises on the *quasi délit*. As to the damages which arise owing to a *délit*, the malice decides as to the responsibility. If A acts wrongfully to B, with intention, *i. e.* with malice, the fault of B would be no excuse.

But if A and B are both in fault without malice, the only juridical question is whose fault determines the loss. The rule of the Roman law is perfectly clear: "Quod quis ex culpâ suâ damnum patitur non intelligitur damnum sentire." And both the French code and ours have adopted this rule without a shadow of difference, or making any distinction. Indeed, there is no logical room for a distinction. It may be difficult in practice to decide who is in fault; and if it be impossible to decide, then it is as though the result were accidental, and the plaintiff must lose.

The maritime rule of most modern States adopted modifications in the case of collision, but they are not quite agreed as to the extent of the innovation. Abbott says that by the law of most of the maritime states, in collisions without fault, in collisions where both parties are in fault, and where the fault cannot be detected, the damages are equally divided. Emerigon does not, however, agree that this is the rule, and contends that the maritime rule goes no further than to divide the damages when there is fault, and it cannot be determined

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where it rests. This, too, is the rule of the *Code de Commerce* 407, which only mentions three contingencies:—

1st. Where the loss is due to accident, the loss is supported by the party who suffers.

2nd. Where by the fault of one of the parties, then by the party in fault; and

3rd. Where there is doubt as to the cause of the collision, then the damage is borne equally by the two ships.

We thus find that the *Code de Commerce* utterly rejects the idea of a joint damage, and only provides for the case where there is some evidence of fault, but not enough to say whose it is. Pardessus, commenting this article, says that the third may be called a *cas fortuit.* This is what, in principle, it should be, but what, under the rule of the *Code de Commerce*, it is not.

In England different rules seem to prevail. Lord Stowell said there were four possible contingencies:—1st. Where there is no blame, when the loss is borne by the party who suffers it. 2nd. Where both parties are to blame, when the loss is to be equally divided between the parties. 3rd. Where the suffering party is alone in fault, when he bears his own loss; and 4th. Where the fault is on the ship which did the damage, when the latter must bear all the loss.

These various views show the danger of leaving the strict principle in an attempt to do a sort of equity. Whether it was this idea borrowed from the Maritime law, which has worked on the modern French writers, I cannot say, but they have given some countenance to the idea of a joint responsibility without adopting the equal division rule. Larombière evidently felt the difficulty, and he, after laying down the general principle of the Roman law in its precise terms, "*quod quis,*" &c., goes on to say:—"*La seule concession que nous puissions faire, c'est donc de permettre aux tribunaux de modérer dans ce cas* (*où il y a faute de la part du lésé*), *suivant les circonstances, le chiffre des dommages et intérêts;* vol. 5, Nos. 29 and 30. This moderating of the damages is under the discretionary power of the Court to assess damages like a jury, explained in No. 28, and which, though a departure from strict principle, is necessary in the practical application of the law.

Less effectively put, the same doctrine is to be found in Aubry & Rau: "Il en résulte encore qu'on ne peut consi-

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dérer comme quasi-délit, un fait qui n'a porté préjudice à autrui, que par suite d'une faute imputable à la personne qui a éprouvé ce préjudice. Lorsqu'il y a eu faute, tant de la part de l'auteur d'un fait, que de la part de celui auquel ce fait a causé dommage, la question de savoir s'il y a lieu à la responsabilité, et la fixation de la part d'indemnité qui peut être due, restent abandonnées à l'arbitrage du juge. Vol. 4, § 446, p. 755. See also Proudhon on the three degrees of *faute* of the Roman Law, Vol. 3, No. 1495.

I am, therefore, of opinion that there is no difference between the English law and the old French law, and that through the technicality of "contributory negligence" we have, practically speaking, the real doctrine of the Roman law, and the only sound juridical rule. To say that because the Judge has a discretion to award damages, he has also an indefinable discretion to apportion them, appears to me to be an error of a two-fold character.

On the merits I am to reverse. There is no evidence that the chain was too weak for the work. Two of the smaller chains broke, but the weight of evidence is in favour of the pretention of appellants, that the breakage on both occasions was due to the persistent disobedience and recklessness of respondent and his single witness. It is, therefore, within the rule *volenti non fit injuria.*

Jugement infirmé.

Kerr, Carter & McGibbon, pour les Appelants.

O. Gaudet, pour l'Intimé.

L'Hon. R. Laflamme, C. R., Conseil.

MONTREAL, 24th NOVEMBER, 1882.

Coram DORION, C. J., MONK, RAMSAY, TESSIER & CROSS, J. J.

No. 505

THE HON. L. O. LORANGER.

Atty. General for the Province of Quebec.

APPELLANT.

&

WALLER REED

Plaintiff in the Court below,

RESPONDENT.

HELD: That the Act 43 and 44 Vict. ch. 9 (Quebec) imposing a tax of ten cents on all exhibits filed in the Superior Court for Lower Canada, by means of stamps affixed to such exhibits, is not *ultra vires*.

Held by Dorion C. J. (dissenting). That this not being a direct tax, cannot be levied for provincial purposes and is not justified by any of the provisions of the British North America Act.

DORION, C. J. (*dissentiens*)—The Respondent, wishing to test the legality of the taxes imposed by the 43 and 44 Vict. ch. 9, (Quebec) obtained a rule *nisi*, for contempt, against the prothonotaries of the Superior Court of the District of Montreal, for refusing to receive and file an exhibit unaccompanied by stamps to the amount of ten cents, as required by the act.

After the return of the rule the Attorney General for the Province of Quebec obtained leave to intervene to sustain the legality of the tax, and contested the rule.

The Court below held that the tax was unconstitutional, and dismissing the contestations of the Appellant, declared the rule absolute against the Prothonotaries, who were condemned to be imprisoned in the common gaol of this District for a period of six months, unless they sooner accepted and filed the exhibit offered by the Respondent. The Prothonotaries were further condemned to pay the costs.

The appeal is by the Attorney General alone. Had the prothonotaries appealed from the judgment, they might probably have raised an important question as to regularity of the proceedings adopted against them. They however have not done

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so, and the only question submitted to us, as between the Appellant, representing the Province of Quebec, and the Respondent, is, as to the legality or illegality of the tax, both parties having at the hearing of the case waived all objections, as to the form or regularity of the proceedings

Before the British North America Act, 1867, the Governor in Council was authorized under the consolidated Statutes of Lower Canada, ch. 109, entitled. "An Act respecting Houses "of correction, Court Houses and Gaols" to impose taxes or duties upon legal proceedings had in any of the Courts in Lower Canada (sect. 32, sub. sect. 1,) these taxes or duties were to be collected, in each District, by persons appointed by the Governor in council and by them paid to the Sheriff of the District to form part of the Building and Jury fund of his District. (Sect. 15 and sect 32, sub. sect. 2 of same Act.)

By an act passed in 1864, (28 Vict. ch. 5, sect. 2), it was provided that these taxes or duties should be collected by means of stamps. Duties were imposed by the Governor in Council, under these statutes, which were still in force when the Confederation of the several provinces took place; and by sect. 129 of the British North America Act, 1867, they were continued in force until they should be *repealed*, *abolished or altered* by the Legislature having authority, under the act, to do so, that is, by the Legislature of the Province of Quebec.

In 1875, the Legislature of the Province of Quebec, by the Act 39th vict. ch. 8, for the first time imposed a tax of ten cents on the filing of every exhibit in a cause. This tax, payable by means of stamps, was to form part of the Consolidated Revenue of the Province of Quebec. (Secs. 1 and 2.)

This Act was repealed by the 43 and 44 Vict. ch. 9, and the same tax of ten cents on the filing of exhibits was re-imposed. (Sect. 9.) Although this Act does not expressly declare that this tax shall form part of the Consolidated Revenue of the Province, as the repealed Statute (39 Vict. ch. 8) did, yet it enacts that all the duties therein mentioned shall be deemed payable to the crown (sect. 3, sub. sect. 2), and they necessarily fall under the provision of the 31 Vict. ch. 9, sect. 3, which declares that all revenue whatever, over which the Legislature of the Province has power of appropriation, shall form one Consolidated Revenue Fund to be appropriated for the public service of the Province.

This special tax has therefore been imposed since the British North America Act by the Legislature of the Province of Quebec to form part of the Consolidated Revenue of the Province. The Hon. L. O. Loranger & Walter Reed.

By the British North America Act, 1867, sect. 92, sub. sect. 2, the Legislature of each province is authorized to raise a revenue for Provincial purposes by means of direct taxation and from the other sources, such as those mentioned in sub. secs. 5, 10 and 15, which have no application to the present case.

To the Dominion Parliament is given the right to raise money by any mode or system of taxation (sect 91, sub. sect. 3.) This right is exclusive when not coming within the classes of subjects assigned to the Provincial legislatures; and as the legislatures of the provinces are only authorised to raise a revenue by direct taxation and the other sources of revenue already mentioned, it follows that the Parliament of Canada has the exclusive right to raise a revenue by means of indirect taxes, and that the legislatures of the provinces have no such right.

The terms of the Act seem clear on this point, and the Judicial Committee of the Privy Council have so interpreted them by deciding in the case of The Attorney General of Quebec & The Queen Insurance Co., that the tax imposed on Insurance Companies by the Act 39 Vict. ch. 7, of the Legislature of the Province of Quebec was *ultra vires*, as not being a direct tax,—(3 L. R. A. C. 1090.)

The main, if not the only question to be decided here, is as to whether the tax imposed on the filing of exhibits, by means of stamps, is a direct or an indirect tax.

Without entering into a minute examination of the authorities, as to what distinguishes a direct from an indirect tax, it will be sufficient to cite an extract of the judgment of the Judicial Committee, in the case just cited, to show that their Lordships have, in that case, laid down a rule as to what constituted an indirect tax, in such an emphatic manner, that I cannot conceive how it is possible for us not to be guided by their decision.

"The single point to be decided upon, (said their Lordships,) is whether a stamp act—an act imposing a stamp on policies, renewals and receipts, with provision for avoiding the policy, renewal or receipt in a court of law, if the stamp is not affixed,

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is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as itis sometimes called, a popular meaning. One or other meaning the words must have; and, in trying to find out their meaning, we must have recourse to the usual sources of information whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken either way there is a multitude of authorities to show that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau, in his elaborate judgment, it is not necessary here, to more than refer to. But surely if one could have been found in favour of the Appellants, it was the duty of the Appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think that they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation or as not being direct taxation. Again, no authority on the other side has been cited on the part of the Appellant.

Lastly, as regards the popular use of the words, two cyclopœdias, at least, have been produced, showing that the popular use of the word is entirely the same in this respect as the technical use of the word. And, here again, there is an utter deficiency on the part of the Appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that is necessary for them to say is, that finding these words in an Act of Parliament, and finding that all the known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the Legislature of England

to include it in the term *direct taxation*, and therefore that the imposition of the stamp duty is not warranted by the terms of the 2nd. sub section of section 92 of the Dominion Act. "

This judgment is conclusive on the point in issue. A stamp tax is not a direct tax, and therefore, not within the legislative powers conferred on the legislatures of the several provinces composing the Dominion of Canada. The present tax is precisely of the same character as the one which the Legislature of Quebec had imposed on Insurance policies by the 39 Vict. ch. 7, and which was declared unconstitutional.

In both cases the tax is imposed on commodities, and it is paid with the expectation, on the part of the party who pays it, that he will recover it back, from some other party, since in the one case the tax was to be added to the premium of insurance and, in the other, it is to be included in the bill of costs. Moreover, in both cases the documents to which the required stamps are not attached, cannot be received as evidence in a court of justice. I fail to perceive any distinction between this case and the one of the Attorney General of Quebec & The Queen's Insurance Co.

It is, however, argued, on behalf of the Appellant, that although the tax may be an indirect tax, yet as it is raised for a special purpose, the *maintenance* of courts of justice, which, according to sub. section 14 of section 92, is to be provided for by the legislatures of the provinces, and as similar taxes existed when the Confederation took place and were continued in force by the 129th section of the British North America Act, 1867, until altered or repealed, it was in the power of the Legislature of the Province of Quebec to vary this tax and to adapt it to the new conditions of provincial existence. It is, moreover, argued that the Building and Jury Fund was merged into the Consolidated Revenue of the Province by section 126 of the British North America Act and that the new taxes raised to defray the expenses of the administration of justice must of necessity go into the Consolidated Revenue Fund of the Province.

This might be a fair argument if the tax imposed by the 43 and 44 Vict., ch. 9, was the same as that which, at the time of the Confederation, was levied under ch. 109 of the Consolidated Statutes of L. C., and if the Building and Jury Fund had

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ceased to exist and been merged into the Consolidated Revenue Fund of the Province, but is this so in point of fact?—The Building and Jury Fund, under chapter 109 of the Consolidated Statutes of L. C. was a local fund created for each district out of certain sources of revenue arising within the district (sect. 15.) The tax on judicial proceedings which formed part of this fund was a local tax, levied by local officers and for local purposes (sect. 17.) The tax of ten cents now under consideration, imposed under the 39th Vict., ch. 8, and since its repeal under the 43 and 44 Vict., ch. 9, is a new tax which did not exist when the Confederation took place. It is a general tax payable into the Provincial treasury and applicable to all the purposes, for which the revenues of the Province may be required.

There may be no provision in the British North America Act to prevent the Provincial Legislatures from authorising the raising of a revenue for local purposes by indirect taxation, but there is one prohibiting them from raising,by such means, a revenue for general purposes and the British Parliament has made but one exception to this prohibition by reserving to the Province of New Bruswick the right to collect existing lumber dues, coupled with the condition that they should not be increased (124.) This shows conclusively that the intention of the act was to deprive the provincial legislatures of the right to levy any revenue for general purposes by indirect taxation.

As to the contention that the Building and Jury Fund has been abolished by section 126 of the Confederation Act, and that the taxes and revenue accruing to it were merged in the Consolidated Revenue of the Province,even supposing it were so, this could only authorise the Provincial authorities to receive existing indirect taxes, but would not entitle the Provincial legislatures to raise new indirect taxes for general purposes, and this tax of ten cents would be excluded. But the simple reading of this section 126 shows that the duties and revenues which are to constitute the Consolidated Revenue Fund to be appropriated for the public service of each province, were those duties and revenues which before the confederation, belonged to each province and formed part of its revenue, and did not comprise the special local funds held in trust for special purposes, such as the Building and Jury

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Fund, which was held by the Sheriffs of each District to be applied to the repairs of Court Houses and Gaols and to the payment of *Petit* Jurors in the District in which they were received, and for the benefit of the inhabitants of the District. It is impossible to suppose that the Imperial Parliament could have intended by a general enactment such as is contained in section 126, to cast that fund in the Consolidated Revenue of the Province to be applied to purposes totally different from those contemplated by the act under which they were raised, while it retained, by section 129, the special dispositions of those acts. The effect of such legislation would have been to raise a fund for a special object under a particular statute and to apply it to other purposes under a general act. As a matter of fact, since Confederation this fund has been kept seperate from the general revenue of the Province, as it was before, and its existence has been expressly recognised by the Legislature by an act passed in 1878, ch. 109, of the consolidated Statutes of L. C., and exempting rural municipalities from contributing to it, on their making *a declaration* that they did not desire that the *petit* jurors of the municipality should be paid for their services. (41 Vict. ch. 16.) The provisions of chapter 109 of the Consolidated Statutes of L. C. being still in force, except as to such portions as may have been amended since Confederation, it is in the power of the Governor General in Council under section 19, to increase the contributions required from the municipalities, to supply the deficiencies in the Building and Jury Fund.

The effect of the present law, if constitutional, would be, in that case, that while the Districts would be made to support the repairs of Gaols and Court Houses and the payment of petit jurors as heretofore, yet the Legislature of the province could withdraw from the fund created for that purpose, the indirect taxes forming part of it, to apply the same to the general purposes and wants of the provice, while they can only raise a revenue by direct taxation.

I cannot find that this could have been intended by the framers of the act, and being of opinion that the tax on the filing of exhibits is an indirect tax, which the local legislature had no right to impose, I would have confirmed the judgment rendered by the Court below,—but the majority of the court holding a different view, the judgment will be reversed.

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CROSS J. — The appeal in this case is from a judgment declaring absolute a rule taken against the Prothonotaries of the Superior Court at Montreal, requiring them at the instance of Rèed the Paintiff in the cause, to put on fyle as an exhibit a promissory note tendered to then for that purpose by the Plaintiff, without the revenue stamp of the value of ten cents being thereto affixed, as required by the Provincial statute 43 and 44 Vict. ch. 9.

The Attorney General intervened to maintain the right of the Prothonotaries to exact the affixing of the stamps as a condition precedent to the fyling of the promissory note which right was denied by Reed, thus bringing in question the authority of the Provincial Legislature to impose the tax.

The questions that arise under the British North American Act of 1867, Imperial Statute 30 Vict. cap., 3 are numerous and embarassing, as well as of frequent occurrence. It is not possible in all cases to reconcile the powers which by sections 91 and 92, are attributed respectively to the Dominion, and to to the Provincial Legislatures, nor is it easy apart from the question of conflict, to determine the extent of the particular powers.

Before invoking considerations of a more extended character embracing notions of a general Policy, presumed intention, or otherwise, I think it is the duty of a Judge to whom a like question to the present is submitted to enquire how far a solution of the difficulty can be reached within the terms of the Statute itself, applying to this task, an appreciation of the context of the different provisions that may bear upon it not omitting the desirability of adopting, when practicable, such a construction as will facilitate, and give efiect to the operation of the law, so as to serve as much as possible, to promote the attainment of its objects.

Previous to confederation, there existed various special funds pertaining to the Revenue Department of the then Province of Canada, raised by its legislative authority for particular purposes, requiring separate accounts thereof to be kept in the financial Department of the Government. Among these may be mentioned the Building and the Jury fund for Lower Canada, as a contribution to which, under the authority of sec. 32 cap. 109 of the consolidated Statutes for Lower Canada the Governor was authorised by any order or orders in

Council, to be from time to time made for such purpose, to impose such tax or duty as he should see fit, on any proceedings had in any of the Courts, in any of the Districts in Lower Canada.

By Statute of the Province of Canada, 27 and 28 Vic., ch. 5, the fees under the tariff made, or to be made under the provisions of the last previously mentioned act, are made collectable by stamps.

By sub. section 14, of section 92, of the British American Act of 1867, there is enumerated as among the exclusive powers of the Provincial Legislatures, the administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

It was to be reasonably expected that this duty should not devolve upon the Provinces, without according to them, such Revenues as had been specially applicable to that particular purpose, such as the Building and jury fund. Accordingly in the fourth schedule annexed to the act, the Building and Jury fund is enumerated among the assets, to be the property of Ontario and Quebec conjointly.

By section 65 of this statute, it is enacted, that "all powers, authorities and functions, which under the authority of the Legislature of upper Canada, Lower Canada, or Canada, were or are before or at the union, vested in, or exerciseable by, the respective Governors or Lieutenant-Governors of those provinces, with the advice, or with the advice and consent of the respective executive councils thereof, or in conjunction with those councils, or with any number of members thereof, or by those Governors or Lieutenant Governors individually, shall as far as the same are capable of being exercised after the union, in relation to the Government of Ontario and Quebec respectively, be vested in, and shall or may be exercised by the Lieutenant Governor of Ontario and Quebec respectively with the advice, or with the advice and consent of, or in conjunction with the respective executive councils, or any member thereof, or by the Lieutenant Governor individually as the case requires, subject nevertheless to be abolished or altered by the respective Legislatures of Ontario and Quebec."

By section 129, all laws, courts of civil and criminal juris-

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diction, legal commissioners, powers and authorities, and all officers judicial administrative and ministerial, are continued as if the union had not been made; subject nevertheless to be repealed, abolished or altered, by the Parliament of Canada, or by the Legislature of the respective Province according to the authority of the Parliament or of that Legislature under the act.

From the foregoing, I conclude, that the regulation, modification, increase or diminution of the Tariff of taxes on legal proceedings, as a contribution to the Building and Jury fund, was vested in the Governor of Canada in council, and by the operation of the British American Act, the power passed to, and became vested in, the Lieutenant Governor in Council who up to the time of the passing of the Quebec statute 43 and 44 Vic. cap. 9, could have lawfully imposed the tax now brought in question.

That under the authority of section 65 of the British American Act the Legislature of Quebec had power to impose and did legally impose the tax in question.

By section 126 such portions of the duties and revenues over which the respective Legislatures of Canada Nova Scotia and New Brunswick, had before the union, power of appropriation, as are by this act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by the ;in accordance with the special powers conferred upon them by said act, are in each Province, to form one consolidated revenue fund to be appropriated for the public service of the Province.

There is no other than this consolidated revenue, out of which the courts can be maintained, or appropriations made, for building and maintaining court houses and gaols, and I can see no valid reason why the tax in question should not be levied and pass into this fund, out of which appropriations must be made to sustain the object for which the tax was originally imposed. It is to be presumed that it will be applied and appropriated by the Legislature in the manner and for the purposes the Building and Jury fund, whereof it formed a part, was designed to be applied, but over that the courts can have no control, it falls to be determined by the Legislation as a matter of public policy, within their jurisdiction. The

question to be decided by us is simply, whether the power remains with the Legislature of the Province of Quebec to lawfully levy the tax in question. I think it does so remain.

RAMSAY J.—This appeal gives rise to some embarrassment, to my mind, however, to little difficulty. There is a technical point to which I may at once refer. The action is taken against the Prothonotary by way of a proceeding for contempt, and the judgment condemns the Prothonotary to go to gaol. This is evidently irregular. If it be a question of contempt the way to bring it up before this Court is by Writ of Error. Our Statutes give in express terms this remedy. However, without the condemnation as for a contempt, it is an order in a case, from which there might be leave to appeal granted on special application. It has not come up to us in that shape. We might, therefore, perhaps dismiss the appeal without adjudicating on the important subject on which it was evidently the intention of the parties, including the Attorney-General of the Province of Quebec, to have a decision.

Although I think it is a wise policy on the part of Courts, generally, to abstain from going further in delivering judgment than is absolutely necessary to settle the differences between the parties, still there are cases where the nature of the question is such as to require a more ample treatment. This occurs when the question involved is of public interest, and where both parties have acquiesced in the proceedings and over-looked the technical difficulty. To the people of this country the settlement of questions arising on our statutory constitution is of the utmost moment, and the delay of litigation, even for a year, may have the most disastrous results. I think, therefore, we should be neglecting our duty if we failed to deal with this case on its intrinsic merits.

The Legislature of the Province of Quebec passed an Act (43 and 44 Vict., Cap. 9), by the 9th section of which it is enacted: "There shall be imposed, levied and collected a duty of ten cents on every writ of summons, issued out of any County Court, Circuit Court, Magistrates' Court, or Commissioners' Court in the Province; *and a duty of ten cents shall be imposed, levied and collected on each promissory note, receipt, bill of particulars and exhibit whatsoever, produced and filed*

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before the Superior Court, the Circuit Court or the Magistrates' Court, such duties payable in stamps." This Act is declared to be an amendment and extension of an Act of the old Province of Canada, 27 and 28 Vict., Cap. 5, "An Act for the collection by means of stamps, of fees of office, dues and duties payable to the Crown upon law proceedings and registrations." (Sec. 20.)

The duties levied under this Act are to be "deemed to be payable to the Crown." (Sec. 3, sub. sec. 2.) These last words might perhaps give rise to verbal criticism. It would seem by the terms of the B. N. A. Act that the Queen forms no part of the Provincial Governments. Indirectly the Sovereign nominates the Lt.-Governor, but he is not the representative of Her Majesty. He acts by virtue of his office, and not by virtue of his commission, in this respect unlike the Governor General *or other officer administering* the Government of Canada. But although I think this criticism well founded, as a fact the old language has been continued both in sanctioning legislation, and in carrying on those branches of administration which have devolved on the local Governments.

I take it, therefore, that this legislation intended and did, in effect, so far as it could, declare that in addition to the duties hitherto authorized to be levied by stamps on judicial proceedings in the Province of Quebec, ten cents should be charged for each promissory note produced and filed in the Superior Court, and that this duty should be collected by stamps and form part of the general revenues of the Province.

It appears that by the 27 and 28 Victoria, fees collected in this way for judicial purposes were credited to a particular fund; but they were declared to be fees payable to the Crown, and I cannot see that this statutory rule of accountability, it is really no more, can have any bearing on the question before us, except to show that they were fees collected for a local object.

Subsequent to the passing of this Act of the 43 and 44 Vic. by the Legislature of the Province of Quebec, the respondent produced, and attempted to file a promissory note, without any stamp of ten cents being affixed. The prothonotary refused to take it without the stamp, and the respondent refused to pay the duty on the ground that the statute was beyond the powers of a local Legislature.

It is not contended that the revenues to be collected in the

Province of Quebec under the 27 and 28 Vic. cap. 5, do not belong to the Government of the Province, or, as I understand it, that the Government of Quebec may not apply the proceeds of these duties to its general purposes, but the duties so fixed prior to Confederation, cannot be altered, or at all events cannot be extended.

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A rule producing results so obviously inconvenient, naturally challenges scrutiny. It is difficult to realize the idea that the Legislature should have intended to charge the local governments with the support of the administration of justice, and at the same time to deprive them of the power to extend the means then recognized by law of providing therefor. The argument, however, is this : the local governments have only two means of raising money by taxation ; one is, not by licenses, (as I have already observed in the case of *Sulte* v. *The Corporation of Three Rivers*), (1) but by legislation with relation to matters coming within the class of shop, saloon, tavern, auctioneer, and other licenses, in order to the raising a revenue for provincial, local, or municipal purposes, and by "direct taxation within the Province" for a like purpose.

Now, it is said that this ten cents stamp is not a license, and it is not direct taxation.

It is not pretended that it is a license,—and even if it were admitted that it was not direct taxation, I do not think the judgment sustainable.

There is, however, a case of *Angers* v. *The Queen Insurance Co.*, (2) which it is contended implies that a duty being subject to collection by means of a stamp, makes it necessarily indirect taxation. It has been said that to reverse the judgment of the Court below was to over-rule the ruling of the Privy Council in *Angers* v. *The Queen Insurance Co.* I am not prepared to carry the authority of precedent so far as to say, that I should be governed by a single decision of a higher Court, which appeared to me to be clearly against principle, even if that Court drew its inspiration from the same sources that we do. Still less should I be bound by a single *arrêt* of the Privy Council, which clearly misinterpreted our law. This

(1) 5 Legal News, 330.

(2) 1 Legal News, 410 ; 22 L. C. J., 307.

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does not seem to be a revolutionary or turbulent mode of performing one's duty.

To this I may add that so soon as the Privy Council lays down as a proposition of law, the issue being clearly before them, that the local Governments have no power to tax otherwise than by licenses and direct taxation, and that direct taxation means certain taxes, and no more, then I shall accept the decision as conclusive and conform my judgments to it, although I know that its effect must be to break up Confederation. But I am not going to discuss anew, or to question what was there decided, but critically to examine what really was decided, and not what, in the gross, may seem to have been said. It appears to me that the report thus examined, does not support the view taken by the learned Chief Justice, but only that the duty sought to be collected in that case by a so called license was in reality an ordinary stamp act, and indirect taxation. Their Lordships say: "The single point to be decided upon is whether a Stamp Act—an Act imposing a stamp on policies, renewals and receipts, with provisions for avoiding the policy, renewal or receipt, in a Court of law, if the stamp is not affixed—is or is not direct taxation." It is true they say afterwards, in referring to the English and American decisions mentioned by Mr Justice Taschereau, "They (the decisions) all treat stamps either as indirect taxation, or as not being direct taxation." That is, these cases decide that the particular stamp Act referred to in each case was indirect taxation, else these are *obiter dicta*, precisely as the case of *Angers* v. *The Queen Insurance Co.* would be an *obiter dictum* if it decided what it is contended it did. No one can seriously contend as an abstract question, I should think, that the *form* of collection, the evidence of payment, can determine as to the nature of the impost. If there was a poll-tax on each elector, and the law said that each elector should take a receipt therefor on paper bearing a penny stamp, it would hardly be said that the penny stamp was a different kind of taxation from the poll-tax.

So far as my recollections carry me, there is not the unanimity of opinion attributed to the economists as to the definitions of direct and indirect taxation. It seems to me they are generally dealt with as relative rather than as positive terms. They are used to express economic results. One of the

best known rules is that taxation is direct when it is paid by the party who is impoverished by it. Thus a duty on imports is regarded as indirect taxation, because the consumer and not the importer, usually bears the burthen. But if the consumer imports his own boots, the tax is as direct as it can be. Again, if this rule were dogmatically true, it would include a license to shoot game, which might very well be accorded by a stamp.

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It is very true that the term *direct taxation* being used in a positive sense, it is the particular function of Courts, by their decisions, to give it a positive meaning. In dealing with this term the operation is one of considerable difficulty, and we must take care in performing it not to out-ride our commission inadvertently. We have to decide what direct taxation is within the meaning of the Act, but there is absolutely no warrant in the B. N. A. Act for our deciding, that the local governments are prohibited from collecting direct taxes by one form or another. As to licenses it is different; the *form* there is material. It therefore appears to me to be indubitable, that we have authority to say that direct taxation in the Act, means a poll or a property and income tax and no more, but we have no authority to say how it shall be levied.

While generally admitting the utility of reference to writers on political economy, judgments, dictionaries and cylopædias for such enlightenment as they may furnish, it seems to me that there are other guides to interpretation quite as safe. As an example, I may quote from a still more recent decision of their Lordships the following sentence: "It becomes obvious as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited." *The Citizens Ins. Co. & Parsons*, (5 Legal News, p. 28.)

I do not think it necessary to pursue the criticism further on this point, for the power of the local legislature to enact the 43 and 44 Vic. appears to me to be beyond question, even if we were to hold that the tax under consideration was indirect taxation. We have, therefore, happily nothing to limit or to modify. Sub. sections 14 and 16 give the right to the

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legislature of the Province to pass the law in question. In proceeding to explain this proposition, it is proper to make two preliminary remarks: First, that the power of the local governments to tax is nowhere confined to licenses and to direct taxation, as has been assumed. They are specially permitted to impose these taxes, that is all; but this differs essentially from a prohibition to impose any other taxes. Secondly, the sub-sections of section 92 must be read with the general heading to avoid misconception. Thus read, sub-section 14 enables the local governments to make laws in relation to "The administration of Justice in the Province, including the constitution, *maintenance*, and organization of Provincial Courts, both of civil and criminal jurisdiction," &c.

Is not the law impugned a law for the maintenance of justice in the Province, nay more a law modeled on the law existing at Confederation for its maintenance? We have held in *Sulte & Three Rivers*, that municipal powers were to be delimited by what then existed. Is it not a similar principle we now invoke?

Again, I would ask is this tax for the performance of a duty by a local functionary not a matter of a merely local nature in this Province? Does it conflict with any Dominion power? Can it be contended for an instant that the power to raise money by any mode or system of taxation can be held to signify that the Dominion Parliament could raise money on the duties to be performed by local officers?

I have said that it has been assumed that the local legislatures had only power to impose taxes by way of direct taxation, by license, I mean assumed in discussion, for the practice, as is frequently the case, is more logical than the didactic utterances regarding it. As an example, a turn-pike on a local road is a tax precisely of the same kind as this. It is an exaction for a service rendered. So, when the Government exacted passage money on the North Shore Railroad it was a tax of a like kind; and I may add, moreover, it was levied by a stamp.

I am to reverse.

Judgment reversed.

Hon. A. Lacoste, Q. C., for the Appellant.
Maclaren, for the Respondent. (1).

(1) An appeal has been taken to the Privy Council.

MONTREAL, 25th. NOVEMBER, 1882.

Coram DORION, C. J., MONK, TESSIER, CROSS & BABY, J. J.

No. 599.

DAVID KELLY.

Plaintiff in error.

&

THE QUEEN.

HELD :—That to support a conviction for forgery of a promissory note under section 25 of the 32 and 33 Vict., ch. 19—it is necessary to allege in the indictment that the note is "for the payment of money" or to show by a recital of the note or by a statement of its amount, that it is "for the payment of money" and a conviction obtained on an indictment containing neither of these averments will be quashed on a writ of error.

DORION C. J.—This case comes before us on a writ of error to set aside the verdict and Judgment rendered in a case of forgery.

The Plaintiff in error was indicted, at Sherbrooke, for having feloniously forged a promissory note with intent to defraud; and in a second count, for having feloniously altered a forged promissory note with intent to defraud. He has demurred to the indictment, and the demurrer having been rejected, he was convicted and sentenced to one year imprisonment in the Common gaol.

He moved for a reserved case, and his application having been refused he has applied for and obtained a writ of error.

The grounds of error urged by the Plaintiff in error are:

1st That it is not stated in the indictment that the promissory note which he is accused to have forged and uttered was "*for the payment of money*," as required by the 25th section of the Act 32 and 33 Vict., ch. 19, entitled. "*An Act respecting forgery*," the terms of the section being, that: "Whosoever forges, " alters, or offers, utters, disposes of, or puts off, knowing the " same to be forged, or altered, any bill of exchange, or any " acceptance, indorsement or assignment of any bill of ex- " change, or any promissory note for the payment of money, " or any indorsement on, or assignment of any such promis- " sory note, with intent to defraud, is guilty of felony."

2ly. That the promissory note is not sufficiently described in the indictment.

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The counsel for the prosecution has cited section 49 of the same act, which provides that "in any indictment for forging "any instrument, etc, it shall be sufficient to describe the same "by any name or designation by which the same may be usual- "ly known, or by the purport thereof, without setting out any "copy or *fac-simile* thereof, or otherwise describing the same "or the value thereof."

This section no doubt covers the second objection made to the indictment, that is the one founded on the insufficient description of the note. (Archbold 577-8,) but does it meet the one relating to the absence in both counts of the indictment of the words "for the payment of money?"

It is a general rule in criminal pleading that the indictment should contain the operative words of the statute, that is, the terms constituting the offence.

"If the indictment proceeds upon a statute, says Russell, "Vol. 2, p. 809, the charge must in general be set forth "(according to the established rule applicable as well to other "cases as to forgery) in the very words of the statute des- "cribing the offence."

Archbold, Crim., pleading, 17 Ed. p. 559, says: "The forgery "should, in prudence, be alleged in the words of the statute "on which the indictment is framed; &c"... and at page 578 the author adds: "From the above precedent an indictment "may readily be framed for forging and uttering a promis- "sory note merely substituting for the words "bill of ex- "change" the words "promissory note for the payment of "money."

At p. 579. "In order that a promissory note should be "within the meaning of s. 22, (which is similar to sect. 25 of our statute) it is necessary that it should be for the payment "of money only; and a country bank-note for the payment "of one guinea, "*in cash or bank of England notes*" was holden, "not to be "a promissory note for the payment of money "within the 2 Geo. 2, c. 25." (*R. v. Wilcook*, 2 Russell, 498.) This decision shows why it should be necessary to describe in the indictment the note as being for the payment of money.

It is, however, contended that as a promissory note is described in art. 2344, c. c. as "a written promise for the payment "of money at all events and without condition," it was unnecessary to charge in the indictment against the Plaintiff in

error, that the promissory note which he was accused of having forged was for the payment of money, since a promissory note would cease to be a promissory note, if it was not for the payment of money.

The same definition of a promissory note as the one given by the Civil Code is to be found in the English books. Smith, Mercantile law p. 199, says: "A *promissory note* is a written "promise to pay a certain sum of money unconditionally."

The Imperial Parliament have nevertheless thought it necessary in describing the offence of forging a promissory note, to add the words "for the payment of money." The same words are made use of in our own statute and it is difficult for us to say that these words are useless and should be left out as mere surplussage. We have examined a great number of cases decided in England and we have not been able to find one in which the words "for the payment of money" were not to be found, except when the amount of the note was stated in the indictment. So it has been held sufficient to describe a promissory note, as a certain note for the payment of £50, (Rex v. James, 7, C. and P. 553). In this case the objection was taken that the two last counts which did not set out the note, were bad, as they did not aver it to be a note for the payment of money.

Judge Patterson, on rejecting the objection, said: Here is stated to be a promissory note for £50. It is certainly not said to be £50 in money, but I must take a promissory note for £50 to be for £50 lawful money and not £50 of lead or any other article. This shows clearly that if the sum had not been mentioned the indictment would have been quashed as not describing the note as being "for payment of money" in the terms of the statute.

In the case of the Queen & McCorkill (8 L. C. jurist., 253, the verdict was set aside by this Court because the indictment did not set forth that the receipt alledged to have been forged was either *for money* or *for goods*, as required by Cons. Stat. of Canada ch. 94, sect. 9.

It is true that the case of James was decided before the 10 and 11 Vict, ch. 100, was passed, and is not directly in point, except that it shows that although a promissory note was then as it is now promised "for the payment of money," it was nevertheless considered necessary to add these words or their

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equivalent, by stating the amount of the note, to sustain an indictment for forgery. This destroys the argument made use of by the prosecution that a promissory note being always for the payment of money it was not necessary to say so in the indictment,–for this reasoning should have had the same force when the case of James was decided, as it has now.

The form given by Bishop, Crim, Procedure, vol. 2, § 448 contains also the words "for the payment of money."

The practice in most of the United States seems also to be to state that the promissory note is for a given sum or "for the payment of money." As far as I have been able to ascertain the practice here has been invariable.

The form given under the procedure act. 32 and 33 Vict., c. 29, in which the forged note is described "as a certain promissory note &c... has been cited as showing that it was not necessary to add the words "for the payment of money" but then if it is not to add those words or a more minute description of the promissory note, what can be the meaning of the "&c" which is to be found after the words promissory note? It must mean that something is to be added, and yet there is nothing added in the present indictment. I will remark here that some of the forms given under this statute are so imperfect, that they are misleading. A careful practitioner will hardly venture to follow them all, notwithstanding the provisions contained in section 27 that these forms may be used and shall be sufficient as respects the several offences to which they relate.

Woolrych, Crim. Law, Vol. 2, p. 676, gives a form of indictment omitting the words "for the payment of money." No reasons are given for this departure from the usual form suggested by those writers who are constantly cited as authorities in matters of criminal procedure and which is universally followed in practice, as far as we can see.

This court is not disposed to encourage the adoption of new forms of indictment, especially when they do not agree with the terms used in the statute to describe the offence to which it is sought to apply them. We think it would be a dangerous precedent to establish to sanction the present indictment and we cannot too much impress upon those whose duty it is to conduct criminal prosecutions to adhere to those rules and forms which are to be found in our standard works and which

have received the sanction of the most experienced practitioners and of repeated and uniform decisions.

The majority of the members of the court are of opinion that error was properly brought, and the judgment and verdict against the Plaintiff in error are therefore set aside.

Baby, J. — I cannot see any necessity for adding in the indictment the words "for the payment of money" to the words "promissory note," which by themselves indicate a promise in writing for the payment of money. The tendency of modern legislation in criminal matters has been to simplify the procedure by eliminating all that is not essential. We have an evidence of that tendency in section 49 of the forgery act and also in section 24 of the procedure act 32 and 33 Vict. c. 29, which are to the effect that it is sufficient in an indictment to describe the instrument referred to, by any name or designation by which it is usually known, without setting out a copy of the instrument or a *fac simile* thereof. The form in the schedule to the procedure act comes in aid of the interpretation I am now giving to these enactments, and when I find in Woolrych a form of indictment precisely the same as the one which has been adopted in this case, I am disposed to consider these words "for the payment of money" as unnecessary and I am therefore constrained to enter my dissent from the judgment about to be rendered.

Baby J. dissentiente.

Judgment and conviction quashed.

J. N. Greenshields, for Plaintiff in error

E. Carter, *Q. C.*, counsel.

R. White, for the Queen.

Mr. White immediately moved the court that the Plaintiff in error be not discharged, but that he be remanded to the gaol of the District of St. Francis in order that another indictmeut be brought against him for the forgery of the note in question. This application was resisted by Mr. Carter on behalf of the Plaintiff in error

Dorion C. J.—There is no doubt that the quashing of an indictment upon a demurrer, or the reversal of a judgment upon

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a writ of error for insufficiency in the indictment is no bar to a second indictment; and there are many instances in which, on the quashing of an indictment, the judges have ordered that the accused be kept in custody, in order that another indictment should be preferred. This however is generally done by the Judges at the assizes. I do not recollect any instance in which it has been done by a court quashing the proceedings on error, although I do not see why, it could not be done, and I rather beleive that we have the power to do so, if we thought proper to exercise it.

In this case, however, there is this difficulty; we have not before us the original depositions and proceedings on which the accused was arrested and committed to stand his trial. We cannot therefore judge whether the evidence was sufficient to commit him or not. It is true that the counsel for the prosecution has placed before us with his motion a copy of the original commitment, but to take action upon this commitment would be acting more on the judgment of the committing magistrate, than upon our own and we do not consider this a satisfactory mode of proceeding. We might perhaps suspend the release of the accused for a few days to give time to the Crown prosecutor to begin other proceedings; but this case does not appear to be one requiring that exceptional measures be taken to secure the accused. We, therefore, prefer to leave the law follow its regular course. The judgment will be in the ordinary form, quashing all the proceedings, and restoring the Plaintiff in error to all things which by reason of the judgment rendered he has lost, and that he may go thereof without delay.

The law officers will not, thereby, be precluded from adopting such other proceedings as they may deem proper.

Motion rejected.

MONTREAL, 25th. NOVEMBER 1882.

Coram DORION, C. J., MONK, RAMSAY, TESSIER, CROSS, J. J.

No. 286.

THOMAS KNEEN & AL.

Defendants in the Superior Cour

APPELLANTS,

&

WILLIAM BOON.

Plaintiff in the Superior Court

RESPONDENT.

The respondent sued the Appellants for an alleged over paid amount of $135.38, his pretension being that he had paid the Appellants a sum of $1300, instead of that of $1144,62 which he owed them. He filed in court several receipts amounting in al to $1300.

HELD: That the Appellants had sufficiently established that on the 18th. June 1877 when they gave a receipt to respondent for $500, they only received a sum of $300, and, that this receipt included a previous payment of $200 made by one Rutherford on Respondent's account, consequently it was Respondent who still owed a balance to Appellants.

CROSS, J.—Boon sued a firm of builders doing business under the name of Thos. & D. Kneen, to recover back an alleged overpayment of $135.38, relating the following circumstances.

In Dec. 1876, the firm of Kneens for whom Daniel Kneen one of them usually acted, undertook the construction of a house for Boon, for which they were to receive $1125.00 Besides fulfilling the contract, they did certain extra work, to the amount of $19.62 making in all a debt of $1144.62.

Between the date last mentioned, and the 18th June following, Boon made the Kneens five payments, in support of which allegation he produces five receipts signed by the Kneens, numbered respectively from 3 to 7 inclusive, the last No. 7 being for $500, dated the 18th June 1877, and the next previous one No. 5 being for $200 dated the 30th May 1877. The previous 3 payments were of $200 each, the sum of these receipts adding up to $1300, shewed an excess of payments over the amount of the Kneens account to the extent of $135.33, the amount sued for.

The Kneens by their plea admitted the contract with the

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extra work, and the payments up to the 30th May inclusive, but with regard to the receipt of the 18th June, they say that they only at that date received $300, and that the receipt then given, included the previous payment represented by the receipt of the 30th May, being a payment not made to them by Boon, but by one Douglas Rutherford who owed the money to Boon, and paid it to the Kneens on his account; that the sums paid amounted to only $1100, which left a balance due by Boon to the Kneens.

Boon for proof relied upon the presumption created in his favor by the production of the receipts. Kneens examined Boon, Rutherford and a bookeeper named Graffty.

On the 18th June, 1880, the court presided by Mr. Justice Torrance found that the Kneens had sustained their pretentions and dismissed the action.

On a rehearing being had in review this judgment was reversed on the 13th Nov. 1880, Mr. Justice Rainville, dissenting. The case now comes to this Court with the opinion of two judges in favor, and two against the judgment as it stands.

Boon on his examination produced a small memorandum book; inscribed only with rather rude pencil marks, being as he says the only book he had containing any entries as to the contract of the Kneens.

In this book, the entries as they now stand, appear in accordance with his pretentions, summing up a total of $1,300, the last entry being $500 as paid on the 18th June, and the next previous one being for $200 as paid on the 30th May. He admits that these entries did not originally stand thus, but that they were altered by him, about Christmas, 1878, the alterations being as follows:

The original entries consisted of but five, omitting entirely the credit of the 30th May, 1877, thus making the sum total of the payments amount to $1,100, in place of $1,300 as he now pretends they should be, but on finding the receipts in a drawer where he had placed them, he discovered the mistake he considers he had made, consequently he erased the entry as it stood 18 June 1877, $500, and substituted one in its place 30th May, 1877, $200, and made an additional new entry after the last one restoring by this new entry, the credit 18th June 1877, $500, thus adding $200, to the sum total of alleged payments,

and thus justifying the alleged over payment to the extent sued for. Up to this time, he never supposed and had no suspicion that Kneens had been overpaid, his belief of the fact arose from his finding the two receipts No. 6 and 7.

He admits that previous to Decr. Thos Kneen twice at least asked payment from him of the balance due under the contract,and for the extra work. On one of these occasions, he told Kneen that if he wanted to have the balance, just then he would have to come and put the flag out, meaning to sell him out. He asked delay for the payment, and told Kneen he would have to wait a while. He also told Kneen to go and get the $200 from Rutherford who owed him the money.

He identifies the receipt No. 6 for $200 as given to him by Rutherford and, when asked if he did not exchange receipts with D. Kneen, returning to him Rutherford's receipt and taking from Kneen receipt No. 6 in Bonaventure St., he answers that he gave Kneen a receipt for $200 for Rutherford in Bonaventure St, after May 1877, but that he never returned any receipts to Kneen.

Rutherford being examined, produces a receipt for the $200 that he got direct from Boon,and not through Kneen, and says that the receipt he gave to Kneen was a special receipt as from himself to serve temporarily until the matter was adjusted with Boon, which would seem to indicate an exchange.

Graffty, a clerk produced extracts from the books of the Kneens, which appear to have been regularly kept, shewing entries of the five payments consecutively, according to their dates, the last, that of the 18th June 1877, receipt No. 7, being entered as a payment of $300 and not of $500, as stated in the receipt.

A deposit slip is also produced of an amount at the time deposited by the Kneens at the Consolidated Bank, corres ponding with the amount they pretend to have received at that time, viz $300.

From the whole it is to be inferred that only $300, and not $500, was received by the Kneens on the 18th June 1877, and that the receipt for $500 was probably given as well to cover the $300 then received, as the $200 previously paid by Rutherford, for which it may reasonably have been supposed that Boon was entitled to a direct receipt, whether one had already been given to Rutherford or through him to Boon.

T. Kneen et al. & Wm. Boon.

It is obvious that both parties were under the impression up to Christmas 1878, that a balance remained due to Kneens. We think that was a correct impression, and ought to have so remained on the memo of Boon; that when he discovered the receipts, his memory of the actual facts had become imperfect; that up to that time, the books of both parties shewed the transaction in that light, (if Boon's memo can be called a book.) Kneen's books were regularly kept and shewed it.

We therefore come to the conclusion to reverse the judgment of the Court of review and to dismiss Boon's action with costs in all the courts.

Judgment reversed.

Robertson & Fleet, for Appellants.
T. P. Butler, for Respondent.

MONTRÉAL, 20 NOVEMBRE 1882.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 373.

ZÉPHIRIN BLOUIN.

APPELANT

&

NORBERT BRUNELLE.

INTIMÉ.

JUGÉ:—Que l'Intimé qui a acheté une terre de son beau-frère Scott, à la charge de payer les dettes de celui-ci, l'a fait dans le but de venir en aide à Scott, et que cette transaction n'est nullement entachée de dol.

TESSIER J.—En 1873, un nommé François Scott demeurait et possédait, dans le canton de Weedon, près de Sherbrooke une terre de la valeur de $200 à $300. Il se trouvait endetté, d'une somme à peu près égale, entr'autres d'une obligation hypothécaire de $113 à Charles Tanguay, du même lieu.

Dans le dessein de gagner de l'argent pour dégrever sa terre de l'hypothèque et payer ses dettes, il émigra à Lewiston, dans l'Etat du Maine, où il séjourna deux ans, mais à la fin de ce temps il se trouva avec $200 de plus de dettes contractées à Lewiston. Parmi ces dernières dettes se trouvait celle de l'Appelant Norbert Blouin, résidant à Lewiston, consistant en deux billets, l'un de $112, l'autre de $60, en tout $172.

François Scott retourna alors au Canada sur sa terre à Weedon, qui n'avait pas augmenté en valeur. Son créancier Blouin, voyant qu'il était en grand danger de perdre sa créance, l'offrit à un nommé Fontaine pour moitié, et le chargea même, d'après le témoignage de Fontaine, d'obtenir ce montant réduit. Cependant l'affaire ne se réglant pas, Blouin chargea Mr. Bélanger, avocat de Sherbrooke, de collecter ce montant. Zéphirin Blouin & N. Brunelle.

Norbert Brunelle, l'Intimé en cette cause, beau-frère du nommé François Scott, sur les conseils de Fontaine et sa promesse qu'il aurait une déduction de moitié du créancier Blouin, acheta la terre de François Scott, à la charge de payer ses dettes qui excédaient la valeur de la terre. C'était en apparence pour rendre service à Scott, qui était âgé, peu capable de travailler et chargé d'une famille.

Brunelle s'est de suite rendu avec Fontaine à Lewiston, et sans informer Blouin qu'il avait acheté la terre de Scott à la charge de payer ses dettes, il a transigé avec lui en obtenant la déduction de moitié sur sa dette et, moyennant $85, il a obtenu une quittance pour le montant des deux billets, qui était de $172.

Blouin, apprenant plus tard que Brunelle avait acheté la terre de Scott à la charge de payer ses dettes, a cru voir un dol dans la conduite de Brunelle, et que ce dol lui permettait de réclamer la moitié de la réclamation, à laquelle il avait ainsi renoncé. Il a commencé par poursuivre Scott, mais n'obtenant rien de lui, il a poursuivi Brunelle et la Cour à Sherbrooke a débouté son action ; c'est de ce jugement qu'il y a appel.

Le jugement adopte pour motif qu'il n'y a pas de preuve de l'identité de la créance de Blouin, sur ce point la preuve n'est pas la meilleure qui eût pu être donnée. Mais à un autre point de vue, il n'y a pas de dol prouvé.

Le Défendeur Intimé Brunelle a payé pour la terre de Scott, même avec la déduction qu'il a obtenue, plus que la vraie valeur de cette terre.

Il est clairement établi que si la terre de Scott eût été décretée, c'était le seul bien qu'il avait, le créancier Blouin n'aurait pas reçu la moitié de sa créance, et aurait tout perdu.

Il est en preuve que le seul motif de Brunelle était de

Zéphirin Blouin & N. Brunelle.

secourir son beau-frère Scott, qui lui serait tombé à ses charges avec sa famille, si la terre eût été vendue en justice.

Il n'y a donc eu ni aucun préjudice fait au créancier Blouin par Brunelle, qui lui a payé plus que la vraie valeur de sa créance. Il est bon de remarquer, qu'il n'y avait pas de lien de droit entre le créancier Blouin et l'acquéreur Brunelle, et que si Blouin eût refusé de faire cette déduction, il était libre à Brunelle et Scott de résilier leur acte, et Blouin n'aurait eu en ce cas aucun recours contre Brunelle.

Par conséquent on ne peut en venir à une autre conclusion que celle de confirmer ce jugement avec dépens.

Jugement confirmé.

L. C. Bélanger, *pour l'Appelant.*
Hall, White & Panneton, *pour l'Intimé.*

QUEBEC, 7 DECEMBER 1882.

Coram DORION, C. J., MONK, TESSIER, CROSS & BABY. J. J.

THE CORPORATION OF THE TOWNSHIP OF WARWICK,

Plaintiff in error.

&

THE QUEEN.

HELD: That the remedy by fine recoverable before a Justice of the Peace against municipalities for not keeping in repair the roads situated within their control, provided for by the Municipal Code, does not exclude the common law remedy for nuisance, in cases in which such remedy existed before the Municipal code.

DORION, C. J.—The Plaintiff in error was fined for $200, on a plea of guilty to an indictment for a misdemeanor, in not keeping in repair and good order, as required by law and the regulations of the municipality, a certain highway situated within the municipality and under its direction and control.

The corporation subsequently obtained a writ of error; the grounds of error being 1st, that the corporation had been sentenced without a trial and without having pleaded guilty, 2ly that the duty of keeping the roads in repair was imposed on the municipalities by the municipal code which provided a remedy by fine recoverable before a Justice of the Peace for any neglect of such duty, and that the Plaintiff in error could not be indicted as he had been.

The record shows that the Plaintiff in error demurred to the indictment; that the demurrer was rejected; that he then filed an argumentative plea; that this plea being objected by the crown-prosecutor the Plaintiff in error through counsel pleaded guilty and was sentenced as above stated.

This disposes effectually of the first ground of error invoked by the Plaintiff in error.

As to the second ground of error, it is true that the municipality could have been sued for the penalty of $20 imposed by art. 793 of the municipal code, in the mode provided for the recovery of such fine by art. 1042; but this does not ex-

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clude the remedy by indictment and the two must be considered as cumulative remedies.

Archbold, Crim. Pleading p. 2,says on this point :—" And if the statute specify a mode of proceeding different from that by indictment, then, if the matter were already an indictable offence at common law, and the statute introduced merely a different mode of *prosecution and punishment*, the remedy is cumulative, and the prosecutor has still the option of proceeding *by indictment* at common law, or by the mode pointed out by the statute ; or even if a statute prohibits, under a penalty, an act which was before lawful, and a subsequent statute, or the same statute, in a subsequent substantive clause ordain a mode of proceeding for the penalty different from that by indictment, the prosecutor may, notwithstanding, proceed by indictment upon the prohibitory clause, as for a misdemeanor at common law, or he may proceed in the manner pointed out by the statute, at his option."

These rules were clearly stated by Lord Mansfield in Rex vs. Robinson, (2 Burrows, 799), and in Rex vs Boyall (2 Burrows 832.) In the first case his Lorship said (p. 803) : " But when " the offence was antecedently punishable by a common " law proceeding, and a statute prescribes a particular re- " medy by a summary proceeding ; then either method may " be pursued, and the prosecutor is at liberty to proceed either " at common law, or in the method prescribed by the statute ; " because there the sanction is cumulative and does not ex- " clude the common law punishment."

P. 805. "The true rule of distinction seems to be that where " the offence intended to be guarded against by a statute was " punishable before the making of such statute prescribing a " particular method of punishing it, then such particular re- " medy is cumulative, and does not take away the former " remedy, but where the statute only enacts that the doing " any act not punishable before, shall for the future be pu- " nishable in such and such a particular manner, then it is "necessary that such particular method, by such act prescribed, " be specifically pursued, and not the common law method of " an indictment."

In the second case, Lord Mainsfield also said :—

P. 834.—" As to the third objection. It was an offence in- " dictable before the appointment of the summary remedy

"prescribed by the statute 22 Car. 2. The case of Rex vs. Davies "M. 28 G. 2, B. R. was of the same kind. Therefore the sum-"mary jurisdiction is cumulative (although there is another "remedy given) and does not exclude the common law "remedy."

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That the common law remedy by indictment against parties for obstructing highways, or for neglecting to repair them, when bound to do so by law, has been introduced here as part of the criminal law of England admits, I believe, of no doubt. There are numerous instances of such prosecutions long before the introduction of municipal institutions in this country. A rather remarkable one occurred in Three Rivers, in 1834, in which the late Chief Justice Vallières, then Provincial Judge of the District, was defendant and which led to the imprisonment of that distinguished Judge for the space of one hour, by order of the court of Quarter Sessions, for contempt—(Stuart's Rep. 593.)

When the public highways were placed under the direction of the municipalities, (see art. 748 of the mun. code,) these municipalities became, as regards the public roads within their jurisdiction, subject to the same remedies which had, theretofore been enforced against those bound to keep public roads in a proper state of repair. Among those remedies was that by indictment for nuisance—and although art. 793 of the mun. code obliges every municipality to cause the roads under its direction to be kept in the state required by law, by the *procès verbaux* or bye-laws by which they are governed, under a penalty of twenty dollars, recoverable by the mode provided for under Art. 1042 of the same code, this as we have seen does not destroy the common law remedy by indictment.

This has already been held in the case of The Queen vs the Corporation of the parish of St. Sauveur (3 Quebec Law Rep. 283), and we see here no reason to dissent from the ruling in that case.

It has been contended that the indictment here was not an indictment under the common law, but an indictment for not keeping the road in repair as required by a particular bye-law passed under the provisions of the mun. code and for which the municipality could not have been indicted before the Code. This, however, is not quite correct. The in-

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dictment is in general terms and mentions no bye-law in particular. It merely charges the municipality with having neglected to repair the road as required by the Code and by the municipal regulations and that the road has become full of cuts, holes and slides and dangerous. This is the common law form, and the Plaintiff in error having by a plea of guilty admitted the offence of which he was charged, cannot now complain of the sentence which the Court has pronounced.

Although I fully concur in the sentiment expressed by Lord Mansfield in the case of Rex vs Boyall when he said: "I do not approve of indicting when there is another remedy; it carries the appearance of oppression," yet this is no reason to maintain error when there is no error and the judgment of the Court below is therefore affirmed.

Judgment confirmed.

Crépeau, Q. C., for Plaintiff in error.
Felton, for the Prosecution.

QUÉBEC, 7 DÉCEMBRE 1882.

Présents DORION, J. C., MONK, TESSIER, CROSS & BABY, J. J.

GEORGE VÉZINA,

Défendeur en Cour de 1e Instance.

APPELANT.

&

LES SYNDICS DES CHEMINS A BARRIÈRES DE LA RIVE NORD DE QUÉBEC.

Demandeurs en Cour de 1e Instance.

INTIMÉS.

Jugé :-1o. Que l'Ordonnance du conseil spécial 4 Vict. chap. 17 et les autres actes qui ont placé les chemins de la rive Nord sous le contrôle des Intimés ne leur ont transféré ces chemins que dans l'état où ils étaient, avec pouvoir d'acquérir les terrains nécessaires pour les élargir et les améliorer, en indemnisant les propriétaires riverains.

2o. Que les Intimés n'ont pas acheté de terrain pour élargir le chemin sur la propriété de l'appelant et qu'ils n'ont droit qu'au chemin existant, y compris le fossé qu'ils ont fait du côté nord du chemin.

3o. Que les intimés n'ont pas droit aux cinq pieds de terrain qu'ils réclament au nord du fossé, qui est la limite du chemin.

4o. Que la cave que l'appelant a construite sur sa propriété n'empiète pas sur le fossé du chemin des Intimés, qui n'ont pas le droit de la faire démolir.

DORION, J. C.—Les Intimés qui sont les syndics des chemins à barrières de la Rive Nord de Québec nommés en vertu de l'Ordonnance du conseil spécial, 4 vict. ch. 17, réclament de l'Appelant une lisière de terre de cinq pieds de profondeur sur vingt pieds de front, comme faisant partie de leur chemin. Ils allèguent dans leur déclaration qu'ils sont propriétaires d'un chemin de *trente-six pieds de largeur*, macadamisé, qui s'étend du pont Dorchester, dans la cité de Québec, jusqu'au Saut-à-la Puce, dans le comté de Montmorency, en vertu de statuts qu'ils indiquent, et que dans le mois de juin, 1880, l'Appelant a construit dans la *côte qui longe le côté nord du chemin en question*, une cave à légumes dont la façade projette de cinq pieds sur vingt sur le chemin des Intimés.

L'Appelant a répondu à cette demande par une défense en fait et par une exception dans laquelle il allègue : que la partie du chemin des Intimés qui traverse sa propriété en est un démembrement ; qu'il a acheté cette propriété à une vente judiciaire ; qu'il est propriétaire du terrain de chaque côté du chemin, qui est en cet endroit borné du côté nord

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par un fossé et du côté sud par une clôture et qu'en faisant la cave, dont les Intimés se plaignent, il n'a pas empiété sur le chemin.

La prétention des Intimés est qu'ils ont droit à un chemin de trente-six pieds de largeur et que, n'y ayant que trente et un pieds de la clôture qui borde le chemin du côté sud au bâtiment que l'Appelant a construit du côté nord du chemin, ils ont le droit de répéter de l'Appelant cinq pieds de terre de profondeur sur toute la largeur de son bâtiment pour compléter les trente six pieds que doit avoir le chemin. Ils citent à l'appui de leur prétention l'ancien acte des chemins (36 Geo. III, ch. 9.) dont la section 2 est en ces termes :—" Et " qu'il soit de plus statué par l'autorité susdite, que tous les " chemins royaux auront *trente pieds de largeur* entre deux " fossés de trois pieds de largeur chaque, sur la profondeur " nécessaire à l'égoutement des eaux ; et où les dits chemins " royaux ne sont point déjà de la largeur *de trente pieds*, le " grand voyer, s'il le trouve nécessaire et praticable, les fera " élargir par ceux obligés de les entretenir."

D'après cette loi, et c'est la seule que les Intimés aient citée, les chemins, qui existaient avant le code municipal ne doivent pas avoir trente-six pieds, mais trente pieds seulement de largeur, avec de plus trois pieds de chaque côté du chemin pour y faire des fossés, lorsque cela est nécessaire. Sur la terre de l'Appelant, les Intimés ont eux mêmes jugé qu'il ne fallait un fossé que d'un côté, au nord du chemin, en sorte qu'ils n'auraient tout au plus droit qu'à un chemin de trente pieds plus trois pieds pour un fossé, en tout trente-trois pieds.

Comme il y a entre la cloture qui est au sud du chemin et le front de la cave de l'Appelant trente-et-un pieds neuf pouces dans une ligne, et trente-et-un pieds dans l'autre, les Intimés ne pourraient tout au plus réclamer qu'une largeur de deux pieds à partir du coin nord-est du bâtiment allant en rétrécissant jusqu'à un pied trois pouces au coin sud-ouest, au lieu de cinq pieds de profondeur sur toute la largeur du bâtiment que leur a accordés la Cour de première instance.

Mais l'acte des chemins reconnait qu'il y avait des chemins royaux qui n'avaient pas trente pieds de largeur, puisqu'il autorise le Grand Voyer, lorsqu'il le trouvera *nécessaire et praticable, de les faire élargir.* Le code municipal, art. 769, le reconnait aussi, et déclare que ces chemins conserveront

leur largeur, quoiqu'elle soit moindre que celle exigée par les lois en vertu desquelles ils ont été établis.

Le chemin en question est un des plus anciens chemins de la province. Lorsqu'il a été placé sous le contrôle des commissaires en 1854 ou 1855, il n'avait pas trente pieds de largeur et le Grand Voyer n'avait jamais jugé qu'il fût nécessaire ni praticable de l'élargir. Les Intimés l'ont pris dans l'état où il se trouvait et quoique le témoin LeMoine qui est l'employé des Intimés, et qui paraît être l'instigateur de ce procès, dise que lorsque le chemin a été macadamisé par les syndics, il lui a donné une largeur de trente-six et même quarante pieds, les faits prouvés démentent cette assertion. Si cela était, les syndics auraient pris plus de terrain qu'ils n'avaient droit d'en prendre, la loi 4 vict., ch. 17, et les autres actes qui ont mis ces chemins sous leur contrôle ne leur donnant que les chemins tels qu'ils étaient avec pouvoir de les élargir, mais, en indemnisant les propriétaires, ce qui n'a pas été fait.

D'Après l'acte des chemins déjà cité, tout chemin royal doit avoir trente pieds de largeur entre les fossés. Ce sont les fossés, lorsqu'il y en a, qui sont la limite du chemin, et rien dans l'acte des chemins, ni dans les lois subséquentes, n'autorise les syndics ou les autorités municipales à prendre un pouce de terrain au delà des trois pieds requis pour y faire un fossé le long d'un chemin public. Lorsque les Intimés ont macadamisé le chemin en question, ils y ont fait le fossé du côté nord du chemin. Ils ont par là eux-mêmes fixé la limite du chemin, et la preuve démontre pourquoi ils l'ont fait où il se trouve, c'est que du côté nord il y a une côte qui longe le chemin et dont le pied arrive au fossé même, si bien qu'à un pied et un pied et neuf pouces du bord du fossé, à l'endroit même où se trouve le front de la cave de l'Appelant, le terrain est déjà élevé de quatre pieds et quelque chose au dessus du niveau du chemin,—en sorte qu'il n'était pas possible d'y passer, ni d'y faire un fossé pour égouter le chemin. Les Intimés ont fait le fossé au pied de la côte, le seul endroit où il était praticable de le faire, et nonobstant ce qu'en dit le témoin LeMoine, ils ont par là laissé en dehors du fossé, et par conséquent en dehors du chemin, le terrain qu'ils réclament maintenant comme fesant partie du chemin. Ce témoin dit également que la cave de

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l'Appelant projette sur le fossé, mais il est contredit par les témoins de l'Appelant et surtout par l'Arpenteur Stein qui, mesure en mains, a constaté que la partie la plus rapprochée de la cave était à un pied et la partie la plus éloignée à un pied et neuf pouces du bord du fossé.

Une dernière observation, c'est que si les Intimés avaient réellement droit d'élargir le chemin, ils devraient le faire du côté du sud où il leur serait facile de déplacer la clôture pendant qu'ils ne peuvent, sans des frais considérables, reculer le fossé et niveler la côte pour en faire une partie du chemin. Nous le répétons, que le chemin ait sa largeur légale ou non, les Intimés n'ont pas droit à un pouce de terre au delà de ce qui peut faire partie du chemin et sert comme tel pour l'usage du public et des fossés, s'il y en a. Or, le terrain qui est au-delà du fossé du côté nord du chemin n'a jamais fait partie du chemin, le public n'en a jamais fait usage, parce que ce terrain est dans une côte et qu'il est impossible d'y passer.—Cependant la Cour de première Instance a cru devoir ordonner à l'Appelant de démolir cinq pieds de profondeur sur toute la largeur de sa cave, donnant ainsi aux Intimés six pieds de largeur de terrain au-delà du fossé du côté nord du chemin—sous le prétexte que le chemin n'a pas sa largeur légale, lorsqu'il est prouvé qu'il n'a jamais été plus large qu'il n'est actuellement et que, dans plusieurs autres endroits il n'est pas plus large, et même moins large, qu'il ne l'est chez l'Appelant.

La majorité de la Cour est d'opinion que l'action des Intimés est mal fondée et qu'elle aurait dû être renvoyée, et le jugement de la Cour de première Instance est infirmé avec dépens.

Jugement infirmé.

Molouin & Malouin, *pour l'Appelant.*

Langlois, Larue & Angers, *pour les Intimés.*

QUÉBEC, 8 FÉVRIER, 1883.

Présents Dorion, J. C., Monk, Tessier, Cross & Baby. J. J.

J.-Bte. LAJOIE,

Défendeur en Cour de 1e. Instance.

Appelant.

&

JAMES DEAN,

Demandeur en Cour de 1e Instance.

Intimé.

Jugé :-Que le concessionnaire de lots de terre appartenant à la Couronne, qui a acheté à la condition de payer et rembourser les améliorations qui auraient été faites sur ces lots, ne peut expulser le détenteur, même sans titre, sans au préalable lui rembourser les améliorations.

L'Intimé, par action pétitoire, réclame trois lots de terre dans la seigneurie du Cap de la Magdeleine, qui lui ont été vendus par le commissaire des terre de la Couronne. L'Appelant répond à cette action que lui et ses auteurs ont fait des impenses et améliorations sur ces lots, au montant de $800,et qu'il ne peut être tenu d'en remettre la possession avant d'être remboursé de ses amélioration.

La Cour de première Instance a renvoyé les exceptions de l'Appelant, déclarant qu'il n'avait pas droit d'être remboursé de ses améliorations, et l'a condamné à délaisser la propriété à l'Intimé.

Dorion, J. C.—Cette cause se présente accompagnée de circonstances spéciales.

Le 2 avril, 1872, l'agent des terres de la Couronne pour la seigneurie du Cap de la Magdeleine octroyait à l'Intimé trois permis d'occupation, avec promesse de vente des lots Nos. 17, 18 et 19 dans le rang St. Théophile de la seigneurie du Cap de la Magdeleine. Ces promesses de vente étaient faites à raison de cinquante cents par chaque acre, avec obligation de tenir feu et lieu, du moins la seconde année et de défricher un arpent de terre, sur chaque lot, la première année, deux arpents la seconde année, trois arpents la troisième année, quatre arpents la quatrième année et enfin cinq arpents la cinquième année.

Ces promesses de vente furent en outre faites à la condi-

J. B. Lajoie & James Dean.

tion que l'Intimé *payerait et rembourserait tous les ouvrages et améliorations qui pourraient avoir été faits sur aucun des dits lots de terre par d'autres que par lui.*

Pierre Robillard et Eugène Chrétien, les auteurs de l'Appelant, étaient alors en possession de ces trois lots de terre qu'ils occupaient sans titre. Ils étaient cependant portés au rôle de cotisation comme propriétaires, Robillard de partie du lot No. 17, et Chrétien de l'autre partie de ce lot, ainsi que des lots No. 18 et No. 19. Ils ont depuis cédé leurs droits à l'Appelant qui a continué de posséder ces lots. Robillard et Chrétien y ont fait au-delà de cinquante arpents de terre ; ils y ont construit deux maisons avec grange et autres bâtiments, et ce sont eux et l'Appelant qui en ont toujours payé les taxes municipales.

Le 12 novembre, 1872, un nommé John McLelland, employé de l'Intimé, fit une déclaration sous serment qu'il connaissait bien les lots numéros 17, 18 et 19, dans la seigneurie du Cap de la Magdeleine, dans le rang saint-Théophile, et qu'ils étaient occupés par deux fermiers, qu'il y avait près de cinquante arpents en culture, et une maison, et une grange sur le lot No. 18, et que ces trois lots, étaient destinés pour une seule ferme.

Cette déclaration fut produite au bureau de l'agent de la seigneurie du Cap de la Magdeleine et le 8 de décembre 1877, le commissaire des terres consentit à l'Intimé un acte de vente de ces trois lots de terre. Le 22 avril 1878, l'Intimé donna avis par écrit, à l'Appelant, qu'il avait obtenu un titre à ces trois lots de terre, et plus tard, il porta son action pour se les faire remettre, alléguant dans sa déclaration et les promesses de vente du 2 avril 1872 et l'acte de vente du 8 décembre 1877.

Il appert par la preuve que, quoique l'Intimé eût obtenu, dès le 2 avril 1872, des permis de se mettre en possession de ces lots, il n'en a jamais informé ni Chrétien, ni Robillard, qui en étaient publiquement en possession avant le mois d'août ou septembre 1877, si ce n'est qu'après qu'ils eurent fait toutes les améliorations qui lui ont permis d'obtenir l'acte de vente du 8 décembre 1877.

Sous ces circonstances, il serait difficile de dire que l'In-

timé, qui a profité des améliorations que Robillard et Chrétien ont faites sur ces lots pour obtenir du Commissaire des terres son titre, pourrait les en expulser sans au moins leur rembourser le prix de leur travail, sans lequel il n'auraient pas pu obtenir le titre qu'il invoque contre eux ou contre l'Appelant qui les représente. Mais nous n'avons pas à nous prononcer, si dans l'espèce ces améliorations ne devraient pas être considérées comme nécessaires puisqu'elles ont servi à procurer à l'Intimé un titre à la propriété même, il nous suffit de dire, que la condition imposée à l'Intimé dans les promesses de vente du 2 avril 1872, et qu'il invoque comme l'origine de son titre, lui impose l'obligation de payer et rembourser les ouvrages et améliorations qui pourraient avoir été faites sur ces lots. Cette condition est censée avoir été imposée dans un intérêt général en faveur de ceux qui auraient pu faire des améliorations et non en faveur du gouvernement qui ne pouvait y avoir aucun droit. L'Appelant, comme représentant Robillard et Chrétien, a le droit de se prévaloir de cette condition et de demander le remboursement des améliorations. Il a aussi le droit de retenir les lots jusqu'à ce qu'il ait été remboursé, et ce d'après les règles contenues dans l'article 419—du code civil.

Quoique l'Appelant et ses auteurs fussent en quelque sorte de bonne foi, en ce sens qu'en fesant des améliorations sur des lots qu'ils croyaient appartenir à la couronne, ils pouvaient espérer que ces lots leur seraient concédés lorsqu'ils auraient accompli les conditions requises par les règles du département des terres de la Couronne, néanmoins ils n'avaient pas cette bonne foi qui est exigée par l'article 412 c. c. pour acquérir les fruits qu'ils ont perçus. Ils n'avaient pas de titre et ils savaient qu'ils possédaient des lots qui ne leur appartenaient pas. L'Appelant doit donc déduire les fruits et revenus que lui et ses auteurs ont perçus, des montants des améliorations qu'il a le droit de réclamer. Le jugement est réformé dans ce sens. L'Intimé est déclaré propriétaire des trois lots de terre qu'il réclame par son action. L'Appelant est condamné à lui en remettre la possession, après qu'il aura été remboursé des impenses et améliorations auxquelles il a droit, et il est ordonné que les impenses et améliorations faites jusqu'au 22 avril, 1878, et les fruits et revenus que

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l'Appelant et ses auteurs ont perçus soient constatés sous l'autorité de la Cour de première Instance. L'Intimé devra payer les frais encourrus sur l'appel, ceux de première Instance réservés.

Jugement réformé.

E. GERIN, *pour l'Appelant.*
J. M. McDOUGALL, *pour l'Intimé.*

QUÉBEC, 6 FÉVRIER, 1883.

Présents DORION, J. C., MONK, TESSIER, CROSS & BABY, J. J.

PAUL BOISVERT,
Défendeur en Cour de 1e Instance.
APPELANT.

&

JACOB MASTINE,
Demandeur en Cour de 1e Instance.
INTIMÉ.

JUGÉ :-Que sur une action en bornage les parties ont le droit de faire une preuve orale et par titres, même après le rapport de l'arpenteur chargé de vérifier les limites des héritages des parties, surtout si ce rapport reconnait l'existence de deux lignes et n'établit pas, à la satisfaction de la Cour, quelle est celle des deux qui doit être suivie.

DORION, J. C.—L'Intimé, propriétaire de la moitié N. O., du lot No. 3 dans le deuxième rang du Township de Wickam, a porté cette action pour obliger l'Appelant, propriétaire de la moitié N. O. du lot No. 3 dans le troisième rang du même township, a établir leur ligne de séparation et à borner.

De consentement, les parties ont nommé J. B. Richard, arpenteur, pour visiter les lieux et faire un rapport sur la ligne qui doit séparer leurs héritages.

M. Richard a fait son rapport et il a constaté qu'il y avait deux lignes bien distinctes qui divisaient le second du troisième rang du Township de Wickam ; que l'une de ces lignes avait été tracée en 1795 et 1796 par l'arpenteur James Rankin, et qu'elle est celle de l'arpentage officiel du Township de Wickham, et que l'autre a été tracée en 1815 par les arpenteurs Benj. Ecuyer et J. Sullivan, lorsqu'il s'est agi de définir sur le terrain des octrois de terres faits à des soldats de la guerre de 1812.

M. Richard se prononce pour la ligne de 1795 comme étant

la seule véritable, mais en même temps il produit copie d'une lettre de l'assistant commissaire des terres de la couronne adressée à M. Dorion, arpenteur, dans laquelle ce fonctionnaire déclare que la ligne de 1815 doit être reconnue comme la vraie ligne de séparation entre les rangs deux et trois du dit township.

Après que ce rapport eut été fait, l'Appelant a fait motion que les conclusions du rapport ne fussent pas acceptées ; que les bornes ne fussent pas plantées entre les héritages des parties d'après la ligne Rankin, mais d'après celle établie en 1815 par Sullivan ; ou que du moins il lui fût permis de faire la preuve des faits mentionnés dans son affidavit.

Dans cet affidavit, l'Appelant allègue que les terrains des parties n'ont été occupés que longtemps après l'arpentage du township de Wickham, en 1815; que d'après la ligne Rankin, le lot de l'Appelant serait court de cinq ou six arpents ; qu'il est prêt à établir par P. N. Dorion et F. A. Cleveland, tous deux arpenteurs, qui ont visité les lieux, que M. Richard fait erreur lorsqu'il dit que la ligne Rankin est droite et la ligne Sullivan croche ; et aussi que la ligne Sullivan est la seule ligne officielle et légale reconnue et adoptée par le département des terres de la Couronne.

Les parties ayant été entendues tant sur le rapport de l'arpenteur Richard que sur cette motion, la Cour Supérieure a renvoyé la motion de l'Appelant, et a homologué le rapport de M. Richard, et ordonné que des bornes seraient placées dans la ligne indiquée par lui comme étant celle tracée par Rankin en 1795.

Il est possible que la ligne de 1795 soit la ligne qui doive être suivie pour diviser les héritages des parties, mais il n'y a ici rien pour l'établir, si ce n'est, l'opinion que donne l'arpenteur Richard dans son rapport. Le poids de cette opinion est considérablement diminué par le fait qu'il semble admettre, qu'au département des terres de la Couronne l'on reconnait la ligne de 1815 comme étant la ligne véritable. D'ailleurs le rapport de l'arpenteur n'est que celui d'un témoin expert, qui mérite toute la considération que l'on doit donner à un homme de l'art, mais comme il l'établit lui même, il y a deux lignes qui ont été tracées d'après les instructions et sous la direction de l'arpenteur général, ou du bureau des terres de la Couronne, et ce n'est pas à l'arpenteur Expert,

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mais bien à la Cour elle-même, à décider laquelle des deux doit être suivie, et il est impossible de le faire avec les données que nous avons devant nous.

En supposant que la ligne de 1795 aurait dû être suivie lors des octrois qui ont été faits des terres du second et du troisième rang du township de Wickam, si de fait ces terres ont été octroyées et bornées d'après la ligne de 1815, et que depuis les propriétaires et occupants de ces terres ont possédé d'après cette dernière ligne, la Cour pourrait-elle, après plus de soixante ans de possession, déclarer que les lignes suivies jusqu'à présent sont erronnées et qu'il faut refaire la carte du township pour suivre une ligne qui n'aurait jamais été reconnue, soit par le département des terres de la Couronne, soit par les intéressés ? Avant de s'exposer à jeter une telle confusion dans les limites des héritages de tout un township, il est important de s'assurer quand les terres en question ont été octroyées, quelles lignes ont alors été suivies et quelles sont celles qui ont été reconnues depuis. Ces informations qui, seules, pourront permettre à la Cour de déterminer d'une manière intelligente qu'elle est la ligne qui doit séparer les héritages des parties, ne peuvent résulter que d'une preuve orale, ou de la production de titres et de documents officiels, et c'est pour cela que la Cour de première Instance aurait dû permettre aux parties de faire l'enquête demandée par l'Appelant.

La Cour infirme le jugement et ordonne que le dossier soit remis à la Cour de première Instance pour y être procédé à l'enquête.

L'Intimé est condamné aux dépens de l'appel.

Jugement Infirmé.

EUG. CRÉPEAU, *pour l'Appelant.*
LAURIER & LAVERGNE, *pour l'Intimé.*

QUÉBEC, 7 DÉCEMBRE, 1882.

Présents DORION, J. C., RAMSAY, TESSIER, CROSS & BABY, J. J.

JOSEPH REYNAR & al.,
Défendeur en Cour du 1e Instance.
APPELANTS.

&

ANDREW THOMPSON,
Demandeur en Cour de 1e Instance.
INTIMÉ.

JUGÉ :—Que celui qui, de bonne foi, a coupé du bois sur les terres de la couronne, croyant qu'elles lui avaient été octroyées, pendant qu'elles étaient comprises dans les limites d'une coupe de bois concédée à un autre, n'est tenu de payer au propriétaire de cette coupe de bois que la valeur du bois sur pied et non la valeur des billots qu'il a faits.

DORION, J. C.—Cet appel est d'un jugement qui a maintenu la saisie Revendication faite par l'Intimé d'une quantité de billots de pin et d'épinette coupés par les Appelants, dans le township Malhiot, sur le St. Maurice, et les a condamnés à remettre ces billots à l'Intimé, ou à leur en payer la valeur, se montant à $1249.45.

En juillet 1879, Ross, Ritchie & Cie., qui avaient été depuis longtemps en possession des lots depuis le No. 34 jusqu'au No. 48 inclusivement, dans le 1er rang du township Malhiot, dans le territoire du St. Maurice, et sur lesquels ils avaient fait des améliorations importantes, demandèrent au gouvernement de leur vendre ces lots et, à cet effet, ils transmirent au département des terres de la couronne une somme de $653.10, prix demandé pour ces terres.

Comme il y avait une question à régler quand à l'indemnité que Ross, Ritchie & Cie., devraient payer au gouvernement pour l'occupation qu'ils avaient eue de ces terres, l'assistant commissaire des terres, M. Taché, reçut cette somme de $653.10 en dépôt à compte du prix des 2177 acres compris dans les lots en question, et leur donna un reçu à cet effet —à messieurs Ross & Cie. au nom de qui l'acquisition était faite.—Le 11 août suivant M. Taché informa l'agent des terres de la couronne, à Trois-Rivières, de ce dépôt et qu'il ne devait pas disposer de ces lots jusqu'à ce que l'affaire fût définitivement réglée.

Cependant, le 6 décembre, 1880, l'agent des terres de la

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Couronne donnait à l'Intimé une licence ou permission, en la forme ordinaire, de coupe de bois sur la limite No. 7, qui comprenait les lots en question. Pendant l'hiver de 1881, les Appelants qui sont les représentants de Ross & Cie., ont fait couper le bois, qui a été saisi à la poursuite de l'Intimé.

Les Appelants outre une, défense en fait, ont plaidé 1o que le bois saisi avait été coupé sur des lots qu'ils avaient acheté du gouvernement dès le 26 juillet 1879, et dont ils étaient en possession depuis au-delà de dix ans ; 2o que le permis de coupe de bois accordé à l'Intimé ne lui donnait pas le droit au bois sur les lots en question qui avaient été vendus et occupés longtemps avant la date de ce permis, et qu'en supposant que ce bois aurait été coupé sur le domaine public, le gouvernement pourrait seul avoir une réclamation, et non l'Intimé ;—que de plus ce bois avait été coupé de bonne foi ; 3o qu'à tout événement l'Intimé ne pourrait tout au plus que réclamer le prix du bois sur pied et non la valeur des billots y compris ce qu'il en a coûté pour les faire, et les dépenses accessoires.

Les Appelants n'ont pas établi que les lots sur lesquels ils ont coupé ce bois fût leur propriété, et ce n'est que le 21 juillet 1881, que par ordre en conseil, ces lots leur ont été vendus. Jusque là ils étaient de simples détenteurs sans titre et leur possession ne pouvait empêcher les agents du gouvernement d'accorder un permis à l'Appelant pour y couper le bois qui s'y trouvait. La prétention que les Appelants ne sont responsables qu'au gouvernement et non à l'Intimé est également mal fondée. La clause 2e du ch. 23 des Statuts Refondus du Canada donne expressément, au porteur de permis de coupe de bois, un droit de propriété sur tous les arbres, bois de sciage et de construction qui seraient ou pourraient être coupés dans l'étendue des limites comprises dans tel permis et les autorise à faire saisir, par voie de saisie revendication ou autrement, tous tels arbres, bois de sciage ou de construction, en la possession de toute personne qui les détiendrait sans autorisation.—L'Intimé était donc bien fondé en vertu du permis qu'il tenait du gouvernement de faire saisir le bois que les Intimés avaient, sans droit, fait couper sur les terres comprises dans les limites couvertes par ce permis.

Il ne reste donc que la question soulevée par la dernière exception des Appelants quand au montant de l'indemnité qu'ils doivent payer à l'Intimé.

Ce dernier prétend qu'en vertu de la clause du statut que nous venons de citer, il a un droit absolu non-seulement à la valeur du bois sur pied, mais encore à toute la valeur que ce bois a acquise par les dépenses que les Appelants ont faites pour en faire des billots et les transporter sur les jetées le long des rivières. Ainsi, il est prouvé que la valeur, sur pied, du bois saisi n'excède pas la somme de $310, pendant que la valeur des billots saisis a été établie par la Cour de première Instance à la somme de $1249.45, et c'est cette dernière somme que l'Intimé prétend avoir le droit d'exiger, et que la Cour de première Instance lui a accordée. Cette prétention est exagérée et résulte de la fausse interprétation donnée à la clause du statut. Le permis de coupe de bois, sans le statut, n'aurait donné au porteur que le droit de couper du bois sur les terres de la couronne auxquelles ce permis s'appliquait, et non le droit d'empêcher d'autres personnes d'y couper du bois et de l'enlever. C'est pour protéger les porteurs de ces permis et leur assurer les avantages résultant de la coupe de tout le bois qui se trouvait dans les limites comprises dans ces permis, que le statut confère à ceux qui en sont porteurs tout droit de propriété sur les arbres, bois de sciage et de construction qui y seraient coupés, ainsi que le droit de les faire saisir—revendiquer.—En vertu de cette clause du statut, le porteur d'un permis de coupe de bois a les mêmes droits sur le bois qui se trouve dans l'étendue de ses limites, que s'il était propriétaire du sol même. S'il était propriétaire du sol il aurait le droi d'y couper, à l'exclusion de tous autres, tout le bois qui s'y trouverait, de saisir revendiquer celui qui aurait été coupé par d'autres, et de poursuivre pour dommages ceux qui pourraient y commettre des empiétements. Tous ces droits sont conférés par le statut aux porteurs de permis de coupe de bois et rien de plus.

Voyons maintenant quels seraient les droits d'un propriétaire qui aurait fait saisir du bois coupé sur sa propriété. Ces droits sont définis par les articles 434 et 435 du code civil.

L'art. 434 dit :—" Si un artisan ou une autre personne a
" employé une matière qui ne lui appartenait pas, à former
" une chose d'une nouvelle espèce, soit que la matière puisse

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"ou non reprendre sa première forme, celui qui en était le "propriétaire a le droit de réclamer la chose qui en a été "formée, en remboursant le prix de la main-d'œuvre."

Art. 435—"Si, cependant, la main-d'œuvre est tel"lement importante qu'elle surpasse de beaucoup la va"leur de la matière employée, l'industrie est alors réputée "la partie principale, et l'ouvrier a le droit de retenir la "chose travaillée, en rendant le prix de la matière au pro"priétaire."

Ici les Appelants ont converti en billots du bois qui appartenait à l'Intimé ;—en le faisant ils ont dépensé près de trois fois la valeur que le bois avait sur pied. Si le bois avait une plus grande valeur que la main-d'œuvre fournie par les Appelants, l'Intimé aurait le droit de réclamer les billots en remboursant à l'Appelant le prix de la main-d'œuvre ; mais comme la main-d'œuvre excède de beaucoup la valeur du bois sur pied, ce sont les Appelants qui sont en droit de retenir les billots en payant à l'Intimé la valeur de son bois.—(Demolombe 710, p. 166, No. 208. Laurent 76, p. 403. Nos. 316 et 317).

Il n'y a pas lieu d'examiner ici, si cette règle serait applicable à un cas où la personne qui aurait employé des matériaux qui ne lui appartiendraient pas aurait été de mauvaise foi. Les Appelants étaient en possession, depuis au-delà de dix ans, des lots de terre sur lesquels ils ont coupé le bois dont il est question. Dès le mois de juillet précédent ils avaient intimé au département des terres de la Couronne qu'ils entendaient les acheter aux prix fixés par le gouvernement, et ils avaient même payé ce prix en entier. Ce n'est qu'à raison d'une réclamation pour occupation antérieure, que la vente n'a pas été complétée avant la date à laquelle le permis de coupe de bois a été accordé à l'Intimé. Les Appelants avaient donc toute raison de croire, lorsqu'ils ont fait couper le bois saisi, que les lots en question leur avaient été octroyés et leur appartenaient. Leur bonne foi ne peut-être mise en doute et les articles 434 et 435 du code civil doivent ici recevoir leur application. Pour déterminer la valeur du bois coupé par les Appelants, nous avons pris les quantités établies par Welch et Broster, tous deux témoins de l'Intimé et les prix qui, d'après les témoins Ritchie et Kiernan, sont

payés par les marchands de bois qui, sans mauvaise foi, ont empiété sur des limites qui ne leur appartenaient pas. J. Reynar et al & And. Thompson.

Par ce calcul nous arrivons à la conclusion que l'Intimé a droit à la somme de $310 pour la valeur du bois coupé par les Appelants sur ses limites. Le jugement est réformé et les Appelants sont condamnés à remettre à l'Intimé les billots saisis, ou à lui payer la somme de $310 pour la valeur sur pied du bois que les Appelants ont fait couper. Les Appelants devront payer les dépens encourrus en Cour de première Instance et l'Intimé ceux de l'appel.

Jugement réformé.

J. M. McDougall, *procureur des Appelants.*

E. Gérin, *procureur de l'Intimé.*

MONTREAL, 29th. MARCH, 1883.

Coram Dorion, C. J., Monk, Ramsay, Cross & Baby, JJ.

JOHN P. MILLAR & AL.

Defendants in Court below

Appellants.

&

THE MERCHANTS BANK OF CANADA.

Plaintiff in Court below

Respondent.

S, having cut timber without authority on the timber limits of the Respondents, sold the logs, to E, and transferred the price to the Appellants. The logs were sold for 80 cts. per standard and the standing timber from which they were made, was worth 40 cts. per standard. E owed a bal of $3188.76 on the price of the logs purchased from S.

Respondents, claiming that S had no right to sell the logs and that the transfer of the price to Appellants was made in fraud of S's creditors and that they were entitled to the bal due by E, sued the three, asking that E be adjudged to pay them the $3188.-76 he owed.

Held (reforming the Judgment of the Court below.)

1o. Tha Respondents were entitled, at their option, to claim their timber from E, on reimbursing him what he had paid for it, or to claim the bal. of the price which he owed, (art. 434-440 c. c.)

2o. That as to S, they were entitled to claim the timber on reimbursing him the price of the labour to convert it into logs and convey it to market. (Art. 434 c. c.)

3o. That S could only transfer the price of labour to which he was entitled and not the value of the timber, and that Respondents and Appellants were entitled each to one half of the bal. due by E, being in the proportion which the value of the timber bore to the price of the labour. (Art. 434 & 440 c. c.

(Monk & Baby, JJ., dissenting.)

This is an involved question arising out of the sale by one John Sunstrum to Ezra B. Eddy of logs, which he had cut on

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timber limits belonging to the Respondents, and the price of which logs he has transferred to the Appellants.

The action is by the Bank against Sunstrum, Eddy and the Appellants, who are all made defendants.

The declaration sets forth : that the Respondents acquired from Ross & Co., on the 27th of September, 1878, a timber berth or limit described as number 140 of 1878-9, which transfer was made to them as a pledge or security for a debt of about $130,000 due them by William Bannerman, of Ren frew.

That on the 9th of January 1879, Bannerman drew a bill upon the defendant Sunstrum, at four months, for $5,641, which bill was transferred to Respondents on account; and was afterwards accepted by Sunstrum, but was dishonored at maturity, namely, on the 12th of may, 1879.

That in November, 1878, Sunstrum illegally entered upon the limit in question, and cut and carried off from it timber of the value of $10,000, which he sold and delivered to Defendant Eddy. And that having become insolvent, he fraudulently transferred the price of it to the Appellants, with intent to defraud his creditors, and to convert such price to his own use; of all of which, all of the Defendants were well aware. And, moreover, that Sunstrum declared openly that he would never pay the Respondents, either the amount of the draft or the price of the timber.

That the said fraudulent or simulated transfer was never signified upon Eddy, until long after the said draft had become dishonored, and Sunstrum had become insolvent. And that the signification then made was illegal and null.

That there still remained in the hands of Eddy $3,188.76, part of the price of the said timber; and that the Respondents, as the proprietors of the timber limit, had a right to recover the said sum of money from Eddy.

The Respondents therefore prayed that it should be declared by the judgment, that the said timber was their property, and that the assignment of its price was fraudulent and void, and should be set aside. And that Eddy should be adjudged to pay to the Respondents the balance of the price of the timber, then in his hands.

The declaration took further conclusions upon other disputes between the parties, but upon an exception requiring

option to be made by the Respondents as to the causes of action on which they would proceed, they made option to continue their demand for the sum of $3,188.76, in the hands of the Defendant Eddy, to be imputed when recovered on account of the value of the timber cut by Sunstrum on the Repondents' limit.

Thereupon Sunstrum declined to plead to the merits. Eddy made default to plead, and filed an admission of all the Respondents' allegations. The Appellants' plea was in substance as follows :—

They allege that they acquired from Sunstrum the money in the hands of Eddy, in the usual course of their business, in good faith, and without any knowledge that the Respondents had any claim to it.

That at the time of the transfer, Sunstrum was in possession as owner, of the timber and of the price of it; and had the right to transfer it.

That Respondents had permitted Sunstrum to cut timber on the limit in question during several months, without objection or notice; which timber was the timber sold to Eddy, the price of which was transferred to the Appellants; and had allowed Sunstrum to contract with Eddy, for the sale and delivery of the timber, without protesting. And that they were therefore debarred from all recourse against the Appellants, who had acquired the price of the said timber in good faith, for valuable consideration, in the usual course of business; which consideration, they alleged consisted of certain advances they had made in the usual course of business to Sunstrum, to enable him to manufacture the said timber, and to bring it to market; without which the timber would have been of no value, and would not have reached the market.

That they were not aware at the time of the transfer, of Sunstrum's alleged insolvency, which they deny; and that even if Respondents had been the proprietors of the limit from which Sunstrum took the timber, which they deny, the Respondents would not, therefore, be entitled to revendicate the price of the timber in their hands, but had only recourse against the timber itself. And that in any case the Appellants were entitled to the amount in Eddy's hands, to an extent

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sufficient to reimburse them the amount advanced by them to Sunstrum in consideration of the transfer, viz., $4,000. They therefore concluded for the dismissal of the action.

By a second plea the Appellants asserted that Sunstrum had authority to cut timber on the limit from the real proprietor thereof, William Bannerman; in consideration of which authority he accepted the draft of Bannerman, already referred to. That the Respondents accepted that draft in payment of any claim they might have, in or upon the said timber limit, and that Sunstrum had authority from Respondents to cut the timber as he did cut it.

For these additional reasons the Appellants concluded for the dimissal of the action.

By a third plea they put in issue all the allegations of the Respondents' declaration.

The Court below held that Respondents were the proprietors of the timber limit in question and of the logs cut by Sunstrum; that Sunstrum had not the right to sell the logs, nor transfer the price, and dismissing the Appellants' contestation, ordered Eddy to pay to the Respondents the sum of $3188,76, which he had acknowledged to owe, as the balance of the price of the logs, sold to him by Sunstrum.

DORION, C. J.—It is not disputed that in the winter of 1878,-1879 Sunstrum has cut timber on the timber berth or limit, no 140;—that he has converted that timber into logs, which he has sold to Eddy, and that Eddy still owes a balance of $3,188.76 on the price of the logs, which price has been transferred to the Appellants.

The issues of fact and of law which the Appellants have raised are:

1st That the Respondents were not the proprietors of the timber berth no 140—but that they only held it as security for Bannerman's debt, who was the real owner of it.

2nd That Sunstrum was authorised as well by the Respondents as by Bannerman to cut the timber on said berth, and that Sunstrum accepted the draft mentioned in the declaration, which was taken by the Respondents as the consideration for the right to cut the said timber.

3ly That Sunstrum, being in possession of the timber, had

the right to sell it and to transfer the price of it, even if it had been cut without permission.

4ly That the transfer was for advances which the Appellants made to Sunstrum to manufacture the timber and to convey it to market, and that Respondents cannot recover the price without reimbursing to the Appellants these advances on which there is a balance due of $4000.

On their part the Respondents contend that the transfer to the Appellants was made to defraud the other creditors of Sunstrum, who was then insolvent, and that the Appellants were aware of his insolvency.

As to the question of ownership of the timber berth, it is proved that Bannerman, who was entitled to it, transferred his rights to Ross & Co., who obtained the license from the crown land department and transferred it to the Respondents as security for Bannerman's debt. This transfer was made and duly registered according to the statute and the regulations of the department.

It had the effect of conveying to the assignee all the rights of the assignor. The Respondents were, therefore, to all intents and purposes the acknowledged owners of this timber berth; and under the statute, (Ch. 23 Cons. St. of Canada, Sect. 2,) they were authorised to seize and revendicate all the timber cut on said berth without authority. This statutary provision, as we have already held in the case of Reynar & al. & Thompson, reported *ante* p. 75, merely gave them the right to claim the timber out on said timber berth, as if they had been the proprietors of the land and subject to all the provisions of the Civil Code applying to the revendication of chattel property, when claimed by the owner thereof.

The Appellants have failed to prove that the Respondents ever authorised Sunstrum to cut any timber on the timber limits in question.

It appears by the evidence that Sunstrum, during the two seasons preceding that of 1878 & 1879, had cut timber on the said berth, while it was in the possession of Bannerman, and it would appear that he again obtained from Bannerman leave to cut timber on said berth in the year 1878-1879. But the Appellants have not proved that this was either to the knowledge or with the consent of the Respondents; and they have not proved that the draft accepted by Sunstrum was the con-

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sideration for the cutting of said timber. The testimony of Bannerman would be proper evidence against Bannerman himself; but it is of no avail to the Appellants as against the Respondents and it was therefore properly rejected.

Sunstrum had therefore no right to cut this timber; and the next question is whether or not, he being in possession of it, the sale which he made was valid. Under the circumstances Sunstrum's possession was not a rightful possession, and if the timber had been still in his hands, the Respondents would have had a right to revendicate it. The sale he made to Eddy merely gave Eddy, who had purchased in good faith, from a timber merchant dealing in such articles, the right to claim to be reimbursed the monies which he might have paid on account. (Art. 1489 & 2268 c. c.)

Art. 1489 is in these terms. " If a thing lost or stolen be " bought in good faith in a fair or market, or at a public " sale, *or from a trader* dealing in similar articles, the owner " cannot reclaim it, without reimbursing to the purchaser " the price he has paid for it."

Art. 2268 is to the same effect.

But the timber does not appear to be now in the possession of Eddy, and the Appellants urge that, although the timber itself might have been revendicated, yet the Respondents have no claim on the price of it.

If such was the case the purchaser at private sale, would be placed on a different and more favorable footing than the purchaser at a judicial sale, for art. 608 C. C. P. expressly provides, that;

" The owner of a thing, who has lent, leased or pledged it, " and who has not prevented its sale, has a right to be paid " the proceeds of its sale, after the claims mentioned in articles 1995 and 1996 in the Civil Code, and the privileged " rights of the crown mentioned in the preceding article " and the claim of the lessor have been collocated."

Art. 609—says: " The same rule applies to the owner of a " thing which has been stolen, who would not have lost his " right to revendicate it had it not been judicially sold."

The same rule is provided for by article 729 as to immoveable property.

These articles have not laid down an exceptional rule applicable to cases of judicial sales only. Their provisions are but

the application of the general principle that the price represents the thing sold and that he who had a right to the thing is entitled to the price of it,—and this principle expressly laid down by the Code as regards judicial sales, is of universal application. Pothier, vente at nº 270-1-2-3-4-5 cites a number of cases supporting this view.

Art. 440 C. C. says : " In all cases where a proprietor whose " material has been employed without his consent, to make " a thing of a different description, may claim the proprie- " torship of such thing, he has the choice of demanding the " restitution of his material in the same kind, quality, weight, " measure and quality, or its value."

If Eddy had paid for the timber,the Respondents might have claimed from him the timber if it had been in *esse*, on reimbursing to him the price he had paid. They claim that portion of the price which he still owes. It is the case provided for by art. 440, and the principle therein stated is highly commended by all the authors and particularly by Demolombe, vol. 10, nº 107, as being consonant both to equity and to reason.

Eddy has no interest in the matter, for it is indifferent to him whether he pays to the Appellants or to the Respondents, the balance which he owes. The Appellants who are the *cessionnaire* of Sunstrum who had no right to sell, and therefore no right to recover the price, can have no more claim than Sunstrum, their *auteur* had. They can not pretend that they are protected by either art. 1489 or 2268, c. c. for they did not acquire a commercial article from a trader dealing in similar commodities, but a mere money claim to which these articles of the Code do not apply, and they are subject to the rule that the *cédant* cannot convey more rights than he himself has.

The last contention of the Appellants that the Respondents cannot claim the price of the timber without reimbursing the advances they have made to Sunstrum to manufacture the logs and to convey them to market, is also without foundation. The advances were made to Sunstrum unconditionally ; a large portion of them long before the date of the transfer. There is no doubt that the transfer was made by Sunstrum in order to reimburse the Appellants their advances, but this is not sufficient to give the Appellants a preferential claim on the price of the logs. There is moreover

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no evidence as to what portion of these advances was employed by Sunstrum in the manufacture of the timber sold to Eddy.

There is no evidence that Sunstrum was insolvent when he made the transfer, nor that the Appellants had any suspicion of his being insolvent. It is on the contrary proved that they continued to make him advances long after the date of the transfer, which they would hardly have done, if they had been dealing with an insolvent debtor. The transfer is therefore a valid transfer to the extent of the claim which Sunstrum had on the logs which he sold to Eddy. What was that claim has now to be considered, in order to determine the judgment which should have been rendered in the cause.

Art. 434 c. c. establishes that; "If an artisan or any other "person have made use of any material which did not belong "to him, to form a thing of a new description, whether the "material can resume its previous form or not, he who was the "owner of it, has a right to demand the thing so formed, on "paying the price of the workmanship.

And art. 435 c. c. contains an exception to this rule and says. "If however the workmanship be so important that it "greatly exceeds the value of the material employed, it is "then considered as the principal part, and the workman "has the right to retain the thing on paying the price of the "material to the proprietor."

Although the words "*une chose d'une nouvelle espèce*" are used in art. 434, Duranton, vol. 4, n° 453 shows that these expressions must be taken in their usual and not in their scientific acception, and that these articles apply as well to a thing to which a new form has been given as to a new substance, and this view has been held as well by the authors as by the jurisprudence. (Demolombe, vol. 10, n° 200 bis.)

Article 434 taken in connection with article 440 c. c. shows that the owner may claim his materials which have been improved by another, by paying the price of the labor bestowed upon them, or that he may claim the value of his materials, at his option.

In the present case, the Respondents have not sought to recover their timber, but the price of the logs sold to Eddy and under art. 440, they are only entitled to the value of the

timber which has been taken from their timber limits to manufacture these logs. J. P. Millar et al & The Merchants Bank of Canada.

The price which Eddy agreed to pay for the logs is 80 cts. per standard log and it is admitted by the parties, that the value of the timber from which these logs were manufactured is 40 cts. per standard. The difference of 40 cts. represents the cost of manufacturing the logs and conveying them to market.

Sunstrum would have been entitled to this difference even if the timber had been attached, either in his possession or in that of Eddy, and by virtue of the assignment which he has made to the Appellants, they are equally entitled to this proportion of the price, although for the reasons already given they are not entitled to the whole price.

We have unanimously decided the case of Reynar & al. & Thompson already referred to, on the same principle, that is, that the holder of the limits on which the timber had been cut, was not entitled to the value of the logs, but only to that of the standing timber from which the logs had been made, which is in all ordinary cases the proper measure of damages. (Art. 440 and 1073 c. c., Sedgwick, on the measure of damages ch. 19, p.p. 583 & 585.)

In a recent case of Allard vs. Tourville & al. (8 Quebec Law Rep. 237) the Court of Review at Quebec, reversing a judgment of the Superior Court, seems to have held that the Plaintiff in addition to the damages he had suffered, was not only entitled to the market value of the timber which the defendants had cut on his property, but to the value of the logs themselves. This ruling may have been justified by some special circumstances of that case, butt he majority of this court do not consider that this rule can apply to this case.

It has been stated that the decision in the case of Reynar & al. & Thompson was not applicable to the present one, because the defendants in that case were in good faith, while here Sunstrum was in bad faith. If it was necessary to enter into the question of good or bad faith, I think it might be shown that there was very little difference between the two cases; but supposing that Sunstrum was in the worst possible bad faith, would that deprive him of the price of his labour and entitle the Respondents to obtain twice the value of their timber, and enrich themselves by the enhanced

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value given to it by another party. We do not think so. In the first place, art. 434, 435 & 440 c. c. make no distinction between those who, in good faith, have made use of materials belonging to others and those who have done so in bad faith, and as Demolombe, (vol. 10, nos 182, 184 & 188) remarks, under the existing law, in most cases it will be as regards the possessors in bad faith, that the rules laid down in art. 570, 571 & 576 (corresponding to our art. 434, 435 & 440) will be applied.

The only penalty attaching to the possesor in bad faith, is that he is liable to pay damages in addition to the value of the materials used if it be proved that he has caused any, (art. 441 c. c. 577 c. n.)

There is an *arrêt* reported by Sirey, 1845, 2—301, which in a most striking instance has established the right of the possessor in bad faith to be indemnified for the labour he has bestowed on the materials of another.

One Arnaud had stolen some wool with which he had manufactured nine pieces of cloth. The cloth was not claimed by the owner of the wool and Arnaud applied to have the cloth returned to him.

The holding of the Court on his application is given in the following terms:

1° Les objets volés que personne ne réclame appartiennent à l'Etat. (Cod. Civ. art. 539, 713 & 719.)

2° Et lorsque l'objet volé est une matière qui a été mise en œuvre par le voleur (par exemple de la laine convertie en drap), la chose ainsi fabriquée appartient au propriétaire de la matière ou au fabricateur, selon que dans l'objet fabriqué, la plus grande valeur appartient à la matière, ou à la main d'œuvre, sauf indemnité par l'autre partie. (Cod. Civ. art 570 571.)

The reasons assigned in the judgment are so clearly enunciated, that it will not be out of place to transcribe here the most salient portion of them.

" Attendu en fait, (says the Court) qu'il est convenu et décidé que ces draps ont été confectionnés avec de la laine volée et recelée par le prévenu.

Attendu que soit d'après l'ancien, soit d'après le nouveau droit, celui qui a employé une matière appartenant à autrui, alors même qu'il l'aurait fait de bonne foi, ne peut se pré-

tendre propriétaire de la chose fabriquée avec elle, quand cette matière est la partie principale de la fabrication; que dans l'espèce la laine est la partie principale, si l'on compare la valeur de cette laine avec les dépenses qu'a nécessitées l'opération par laquelle elle a été convertie en drap :

Qu'il suit de là, que le prévenu est mal fondé dans sa demande en restitution des draps, ces draps étant, par voie d'accession, la propriété de l'Etat, qui est reconnu propriétaire de la laine avec laquelle ils ont été fabriqués ;

Attendu que le prévenu ne peut pas être traité avec plus de faveur que ne le serait une personne qui, de bonne foi, aurait fabriqué des draps avec la laine appartenant à autrui ; Que dans une telle hypothèse, le seul droit que la loi reconnait à celui qui a fabriqué les draps est le remboursement du prix de la main d'œuvre ;

Qu'il y a donc lieu seulement de réserver au prévenu ses droits contre l'Etat rélativement à cette main d'œuvre, sauf les droits de l'Etat à raison des compensations prononcées contre celui-ci en sa faveur ;

Par ces motifs, rejette la demande d'Arnaud en restitution des draps saisis, *lui réserve ses droits à faire valoir à raison de la main d'œuvre de la fabrication de ces draps* etc."

Sirey, in a foot note, says of this *arrêt*. "Ce n'est là, " comme on le voit, qu'une juste application du principe con- " sacré par les art. 570 et 571 Cod. Civ."

Laurent, (vol. 10, nº 418) & Demolombe, (vol. 10, nº 199) both cite this arrêt approvingly.

For these reasons the majority of the Court consider that the Respondents are only entitled to one half of the price of the logs due by Eddy and that the Appellants are entitled to the other half.

The judgment of the Court below will, therefore, be reformed and Eddy will be ordered to pay $1594,38 to the Respondents instead of $3188,76, and as the Appellants have taken no conclusions against Eddy, but simply asked that the Respondents demand be rejected, it is dismissed as to the balance of $1594,38 and the recourse of the Appellants reserved against Eddy for this balance. The Respondents are to have their costs in the Court below and to pay the costs of this appeal.

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Baby, J., was for confirming the judgment on the ground that Sunstrum, who had no title whatsoever to cut the timber, was in bad faith and therefore not entitled to any portion of the price of the logs. Monk, J., also dissented on the same grounds. This was a case of atrocious bad faith on the part of Sunstrum and the case of Reynar & al. & Thompson did not apply to such a case as this.

Judgment reformed.

MM. Laflamme & Laflamme, *for Appellants*,
MM. Abbott, Tait & Abbott, *for Respondents*.

MONTREAL 22nd. JUNE, 1878.

Coram Dorion, C. J., Monk, Ramsay, Tessier, Cross, J. J.

No. 152

HENRY BULMER & al,

Appellants.

&

TOUSSAINT O. DUFRESNE & al,

Respondents.

Dufresne owned a land *grevée de substitution* in favour of his children. He sold to Bulmer the right to take sand on that land during five years: Bulmer accordingly carried away from the land a certain quantity of sand, *during the lifetime of Dufresne*, and duly paid him for it. When the substitution opened, at Dufresne's death, his children claimed from Bulmer the value of that sand.

Held, that their claim was well founded and that Bulmer was bound to pay the sand a second time: *Ramsay and Cross, J. J.*, in Court of Queen's Bench, and *Taschereau* J., Supreme Court, *dissentientibus*. — Held also: by the Court of Queen's Bench and the Supreme Court that, even before the Registry laws, in Lower-Canada, the want of *publication et insinuation* of a will creating a substitution within six months of the death of the testator dit not invalidate the substitution: *Taschereau* J., dissenting in Supreme Court.

Dorion, Sir A. A., C. J.—This is an Appeal from a Judgment rendered by the Superior Court, at Montreal, on the 12th day of May, 1877, (21 L. C. J., 98.) The Appellants were condemned to pay to the Respondents a sum of $929.20, for the price and value of 9292 loads of sand, taken from a property bequeathed by Suzanne Pepin to her son, Jean Baptiste Dufresne, with reversion, at his death, to his lawful children.

The facts are as follows :—

On the 27th of October, 1828, Suzanne Pepin, by her last will, bequeathed to her eleven children certain real estate in

the Parish of Montreal, with reversion, after their death, to their children.

The testatrix, Suzanne Pepin, died on the 30th of July, 1834. Her will was published in open Court, and was duly registered in the Registers of the late Court of Queen's Bench, as then required by law, on the 15th day of April, 1835.

A short time after the death of Suzanne Pepin, her children divided the real estate she had bequeathed by her will. By this division the lot in question in this case accrued to Jean Baptiste Dufresne, the father of the Respondents, who enjoyed the same under the will of his mother until his death, which occurred on the 5th of March, 1872.

While Jean Baptiste Dufresne was in possession of this property, by virtue of the life interest he had therein, he sold to the Appellants, by two separate deeds, for $330, all the sand they could take therefrom during a period of five years, to be reckoned from the 15th of December, 1866.

Under these sales the Appellants, during the lifetime of Jean Baptiste Dufresne, removed from the property in question a large quantity of sand, which, according to the judgment of the Court below, consisted of 9,292 loads, valued at 16 cents per load.

At the death of Jean Baptiste Dufresne there were living eight children, issue of his marriage with Eléonore Derome, who were entitled to the reversion of this property under the will of their grandmother, Suzanne Pepin.

Eléonore Dufresne, one of them, is married and lives at Brooklyn, in the State of New York.

Another one, Joseph Alphonse Dufresne, transferred his rights to his brother, George Henri Dufresne, who, with five of his brothers and sisters, claim, by this action, the whole value of the sand which the Appellants have removed.

The latter have demurred to the declaration, and pleaded two exceptions and the general issue.

By their demurrer and their first exception, the Appellants challenge the Respondents' right of action. In their second exception they allege the sales made to them by Jean Baptiste Dufresne, who was in open and public possession of the property; and they further allege that these sales were made to the knowledge and with the consent of the Respondents.

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The contention of the Appellants is :—

1st. That the Respondents had no actual interest in the property during their father's lifetime—their title being contingent on their surviving him ; that their father had the right to sell the sand, which became chattel property as soon as it was removed from the soil, and that their only recourse, if any they have, is against their father's estate.

2nd. That Eléonore Dufresne should have been joined in the action with her brothers and sisters.

3rd. That she should have joined in the renunciation to her father's estate.

4th. That the title of the Respondents is absolutely null and void as to them, who are third parties, because the will of the late Suzanne Pepin was not published and registered within six months after her death.

5th. That George Henri Dufresne formally ratified the sale made by his father, by becoming a party to the transfer of part of the price of sale.

6th. That the amount allowed by the Court below is not justified by the evidence, either of the quantity of sand taken by the Appellants or of its value.

The first question, as to whether the Respondents have any right of action under the circumstances disclosed, is the most important one in the case ; but the fourth question raised has to be examined first—since, if the absence of publication and registration of the will within six months of the decease of the testator rendered the substitution inoperative, it would be useless to enter into the consideration of the other issues.

On this point the law is fully expressed in Article 941 of the Civil Code of Lower Canada. The first paragraph substitutes registration at the Registry Offices for the judicial publication heretofore required. The other paragraphs indicate its effect, which is, that if this registration takes place within six months, it has a retroactive effect to the time of the death of the testator ; and that if it takes place after the six months have expired, its effect commences only from the date of the registration. In other terms, judicial publication within six months after the death of the testator preserved the rights of those having a reversionary interest, as if the substitution had been published on the very day the testator died, while a subsequent publication only took effect from its date, and

did not affect rights acquired by third parties prior to such publication. H. Bulmer et al & T. O. Dufresne et al.

In this instance the will was regularly published on the 15th of April, 1835. The first sale by J. Bte. Dufresne to Appellants was by deed bearing date the 15th of December, 1866. This publication has therefore full force and effect as to the Appellants, since they had not acquired any rights at the time it took place, and the pretention that the substitution is absolutely null and void, has no foundation in law.

The effect of such publication is a notice to all the world of the limited rigth of the *grevé* or institute in the property of which he has only a life interest, and of the reversionary interest of the *appelés* or substitutes;—and as none except those mentioned in Article 940 of the Civil Code are bound to take notice of an unpublished substitution, all parties are by law deemed to have acquired a knowledge of a duly published substitution, and this forms a presumption *juris* and *de jure*, which cannot be controverted by any evidence to the contrary. The effect of the judicial publication of a substitution had, before registration was substituted for it, the same effect as registration now has, to preserve all the rights of the substitutes. Those rights consist in the reversion in an undiminished state of the property substituted or entailed. (Article 949 of the Civil Code.)

The Institute, altho holding as proprietor, cannot alienate the property substituted.—(Art. 950 and 952 C. C.) Moveable property subject to a substitution can not even be sold except by public sale.—(Art. 931 C. C.)

These rules are well expressed by Rousseaud de Lacombe—Vo. Substitution, Dist. 8, No. 1:

" Le fidéicommissaire prend le fidéicommis exempt des " charges et hypothèques créées par le grevé, et peut révo- " quer les aliénations par lui faites quoiqu'au tems qu'elles " ont été faites, il fût incertain, s'il serait dû, *Arrêt de* 1586— " *Montholon* c. 45,—il n'est pas même tenu de se contenter " du prix quoique les deux contractants ayent été de bonne " foi."

Dalloz—Vo. Substitution, sect. 2, art. 5, § 2—says:—

" Il (le *grevé*) est soumis à la plupart des charges de l'usu- " fruitier."

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"Obligé de rendre les biens, il doit à leur conservation tous "les soins d'un bon père de famille.

And again at p. 245 of the same Article the same author says :—

"Le grevé est un dépositaire chargé de rendre comme il a "pris et tout ce qu'il a pris."

....

"Inaliénables de leur nature, les fonds substitués ne "peuvent se dissiper par aucun mode *indirect* d'aliénation."

These citations, which might be accumulated to any extent, show that the *grevé* or substitute has not the right to dispose absolutely of the substituted property, and that the alienations made by him are revoked at his death, or on the advent of the condition on which the substitution was made.

In the present case J.-Bte. Dufresne had no right to sell the property itself, and the Appellants are by law presumed to have known it. But it is contended that the *grevé* did not sell the property itself, but only the sand which was to be found in it, and which became moveable property as soon as it was removed from the ground.

In the first place J.-B. Dufresne, the *grevé*, had no more right to sell the sand than the property itself. Sand in the vicinity of a large city, like Montreal, is an article having a commercial value. It is assimilated to mines, quarries, stones, &c., and the rule about disposing of these in cases of subststutions, as in cases of simple usufruct, is, that the *grcvé*, like the *usufruitier*, can dispose of them, if the mine quarry were opened during the life of the grantor, for if he were in the habit of disposing them the law supposes that he intended that the *grevé* should enjoy the property in the same manner as he did himself, but not otherwise; and, therefore, if the grantor was not in the habit of working the mines and quarries on his property, the *grevé* cannot do it.—(Art. 460 Civil Code.)

As regards the right of the *grevé* or *usufruitier*, sand and other commercial articles have always been placed on the same footing as mines and quarries, for such articles cannot be classed as natural fruits of the property.—(Proudhon, de l'usufruit T. 2, No. 719 and 735.)

The position of the Appellants is that of purchasers of property which they knew the vendor had no right to sell.

They, by connivance with the *grevé*, have acquired, to the injury of the Respondents, the substance of what the latter were entitled to, and which has since accrued to them by virtue of their right of reversion. If the property has thereby been damaged, the interests of the Respondent have been *pro tanto* affected.

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But it is contended, on the part of the Appellants, that when they purchased and removed the sand, the Respondents had no interest whatsoever in the property, that they then had a mere expectancy not yet realized, and which gave them no right, except an action to prevent the waste done if any.

This is an admission that the Respondents could have taken proceedings to forbid the Appellants from removing the sand they had purchased from the *grevé*. If so, they had a right of action not only against the *grevé* but also against the Appellants, to prevent them from destroying the value of property to which they had this right of reversion in expectancy.

It would be a singular system which would provide a remedy to prevent injury being done to property and would give none to recover compensation from the wrongdoers for the damages actually done.

If the Respondents have no action for damages on the ground that they had not acquired rights when the injury was done, how could they have one to prevent that injury being done?

A simple reference to the principles governing substitution will effectually dispel any doubt on this subject.

In the first place the *grevé* takes the property as proprietor, it is true, but subject to the obligation of delivering it back, and without prejudice to the rights of the institute.—(Art. 944, Civil Code.)

2ndly. He may be compelled to give security for deterioration or he may be deprived of the possession of the property substituted—which, in that case, is given to the substitute as a sequestration.—(Art. 965, Civil Code.)

3rdly. When the condition on which the reversion is to take place occurs, the substitute takes the possession from the institute, but he takes the property directly from the grantor.—Art. 962, Civil Code.)

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And lastly. The substitute may, while the substitution lasts, that is, pending the condition, dispose, by act *inter vivos*, or by will, of his eventual right to the property substituted, subject to the contingency of its lapsing; and he may perform all acts of a conservatory nature connected with his eventual rights, whether against the institute or *against third parties*.—(Art. 956, Civil Code.)

All this shows that the reversionary interest of the substitute is a substantial right which the law surrounds with all possible protection, and to which the law recognizes a real value, since it allows the reversioner to dispose it by any of the modes by which a proprietor can dispose of his property. If the property subject to this right of reversion is damaged or deteriorated to the extent of one-half of its value, the commercial value of the right of reversion is diminished in proportion, and to the extent of such diminution the reversioner is injured. The injury may be done by the *grevé*, or it may be done by third parties without any default on the part of the *grevé*, or it may be done by third parties with the connivance of the *grevé*. In the first case the *grevé* alone is responsible. In the second he cannot be responsible since there is no fault of his—the third parties who have committed the injury must alone be responsible, in virtue of that first principle of justice, that he who wilfully commits a wrong is responsible for the damage done.—(Art. 1053, Civil Code; Sourdat, T. 1, No. 336, No. 453.)

For the same reason if the damages have been done by third parties, with the connivance of the *grevé*, they are all jointly and severally responsible for it.—(Art. 1106, Civil Code; Sourdat, T. 1, No. 704.)

If these principles would apply pending the condition and while the substitution still holds, would they not *à fortiori* be applicable after the event has taken place, and the expectancy of the reversioners has become an absolute right to the property. As already shown, the Appellants have taken the sand when they knew or were bound to know that Jean Baptiste Dufresne was a mere *grevé de substitution*, and that he had no right to sell. It is not the case of a purchaser in good faith buying a load of sand or a load of wood from one who had no right to sell. They purchased knowing that the sand was to be taken from a substituted

property, and they stipulated that they should remove it themselves. In the eyes of the law they are in every sense of the term wrongdoers, and must, as such, repair the damages they have caused to the Respondents, who eventually have become possessed of a property diminished in value, owing to the unlawful acts of the Appellants. The damage consists in the value of the sand at the time the Respondents became entitled to the property, that is, at the opening of the substitution.

To the extent of such value the Appellants have profited of property belonging to the Respondents, and they are bound to reimburse the value of it to the Respondents, the real owners thereof. In accordance with this view of the case, this Court has reversed the judgment in DeBeaujeu and Perry, 16th September, 1875, and condemned Perry to pay to the Appellant, DeBeaujeu, the value of timber which he had purchased and converted to his use, with the knowledge that it had been cut, without leave, on Mr. DeBeaujeu's property.

Domat, Book 3rd, Tit. 8, Sec. 4, Nos. 306, 362, 406, 7, 8, 9.

Pothier, de la Propriété.

Bédaride, No. 966, Traité de la fraude, Journal des Avoués, pp. 543, 4.

Dalmas et Verdillon, Dalloz, Rec. Per. 1859, 2, 114.

Monteaux et Carnand, Dalloz, Rec. Per. 1859, 2, 8.

Sirard et Chauvet, Sirey, 1840, 2, 113.

The majority of the Court is of opinion that the judgment rendered by the Superior Court is right in principle, but that it must be modified in two particulars.—

1st. Because the Respondents could not claim the share of Eléonore Dufresne, whose domicile is known, and who, therefore, is not an absentee in the sense of Art. 93 and 105 of the Civil Code.

2ndly. Because George Henri Dufresne has ratified the sale made to the Appellants, by becoming a party to the transfer of part of the purchase money as security for his father. This, however, only applies to his own share and not to that purchased from his brother, Joseph Alphonse Dufresne, which he acquired long after the date of the transfer to which he was a party.

As to the quality and value of the sand taken by the Appellants, this has been settled by the Superior Court, and

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we find no sufficient reason to interfere with the conclusion arrived at by the Court below on these two questions.

The judgment will, therefore, be reformed, by deducting two-eighths of the amount allowed—these two eighths being for the shares of Eléonore Dufresne and of George Henri Dufresne.

As to the costs, we consider that the Appellants must bear six-eighths of those incurred by Respondents, and that the Respondents must bear two-eighths of those incurred by Appellants in both Courts—this being the proportion in which parties respectively succeed.

Ramsay, J.—This is an action brought by the *appelés* to a substitution, after the death of the *grevé*, against the Respondents, for damages caused to the property substituted by reason of the latter having taken a quantity of sand from the said property, before the opening of the substitution, under a deed of agreement with the *grevé*.

The first question that arises is, whether such an action lies? It is somewhat remarkable that at the argument no direct authority in support of such an action, or any precedent for such an action was produced. We were referred to general principles as to the limits of the usufruitier, or of the *grevé de substitution*, and we were invited to imagine the rest.

It is hardly possible to suppose that there can be a new action at common law, and I have endeavoured to find out whether the omission to quote any precedent for his action was an oversight on the part of the learned counsel for the Plaintiffs, but I have been unable to find, either in France or England, any authority for such an action. On the other hand, I find authority against it. Pothier, in his Tr. des Substitutions, Sect. 6, Art, 282, gives the actions which the *substitué* has. He has the *actions personnelles* "*contre le grevé ou les héritiers ou autre successeurs du grevé, pour la restitution des sommes et choses comprises en la substitution, avec les fruits des dites choses, et intérêts des dites sommes, et les dommages et intérêts qui peuvent être dus au substitué pour les détériorations que le grevé aurait pu causer par sa faute ou négligence aux biens substitués.*"

"2o. *L'action de revendication des immeubles compris en la*

substitution, qu'a le substitué contre ceux qui les possèdent, soit que ce soit des tiers détenteurs, " &c. &c.

" 3o. *L'action hypothécaire.*"

He has not then, it would appear, the action of revendication against third parties, even if the sand had been recognizable. Without for the moment entering into the question of whether the *grevé* can open a quarry and take sand, it is evident that, in the abstract, when the sand is taken it is a *fruit* of the land ; it therefore becomes movable, (POTHIER, Tr du Drt. de Prop., No. 151,) and according to the doctrine of POTHIER, in the Tr. des Subst. *loco citato*, no revendication lies to recover it in the hands of third parties. It is a mere fallacy to say that it is a part of the realty ; you may as well say that a cabbage is part of the realty, because it has absorbed a portion of its bulk from the soil. Further, it is no answer to say that an action would lie by the *substitué* against a trespasser. Doubtless such an action would lie here *ex delicto*, as it does in England, against a trespasser *vi et armis ;* but the Appellants are not in that position. It was *fault* in Dufresne to misuse the property of which he had the administration, but it was no fault in the Appellants to deal in good faith with the proprietor in possession. If this is *fault* on the part of Appellants, the principle will lead us a long way, and we sould be forced to maintain an action against any or all of the labourers who shovelled and carted the sand away. It is said Appellants knew by the insinuation and should have been on their guard. I understand insinuation is intended to warn the public againts acquiring real or hypothecary rights in substituted property, not as a protection to the *substitué* against the maladministration of the *grevé.*

I would draw one other illustration from a matter which was insisted on at the argument, but which is not the point creating the division of opinion in the Court. The proprietor, *à titre de substitution*, has no right to change the form of the property. POTHIER, Tr. du Drt. de Propriété. No. 9. Now suppose he caused an ancient meadow to be plowed, would the ploughman be liable in damages in an action by the heir ? If not, the Appellants cannot be liable, for the one is just as much *fault* as the other, and the ploughman knew by insinuation that there was a substitution just as well as the Appellants. Again, would it not be manifestly unjust that

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the *substitués*, who are protected by a curator, and several of whom were in the particular case present, should lie by during their father's lifetime, and then pounce upon the Appellants, as the Plaintiffs have done ? Why did they not sequestrate the estate if the *grevé* was deteriorating it ? It was their right and their duty ; if they suffer, it is by their own *laches*.

The next point is the form of the action ; it is in damages. Now, what is the proper measure of damages ? Certainly not the value of the sand valued by the cart load at the opening of the substitution. That is not a damage Appellants could have contemplated, for the substitution might have opened at any time, or never have opened at all. All the *substitués* could have claimed, was the value of the sand at the time it was sold, or the deterioration of the land now. Of this last, there is some evidence ; of the former, none, except so far as it is furnished by the price of the sand paid by Appellants. There is no testimony to show that 9,000 (nine thousand) loads were taken. It might as well be said there were 18,000 (eighteen thousand). It is evidently an exaggerated mode of valuing the sand, to put the sale by the cart load would require a regular organization of people to attend to its sale and delivery, and that, at any rate, should be deducted from the probable proceeds of sale.

On the whole, I think the action unfounded in law, and the amount of damages exorbitant. The most they should have been estimated at should be $300 (three hundred dollars). I think the judgment should be reversed.

Cross, J.—The Judgment appealed from in this cause, awarded the Respondents $929.20 for the value of sand taken by the Appellants from two lots of land at Côte de la Visitation, near the City of Montreal.

The Respondents claim to be substitutes under the will of their grand-mother, the late Susanne Pepin, original owner of these lots.

She died, 30th July, 1834, leaving a will whereby she devised property, including the lots in question, for life, to her son Jean Bte. Dufresne with reversion to his children at his

decease, thus creating a substitution wherein Jean Bte. Dufresne was the institute and his children the substitutes.

Jean Bte. Dufresne took possession; and by deed before Mathieu, notary, dated the 15th December, 1866, he sold to the Appellants all the sand to be taken off the lots in question, during the next succeeding 5 years. They took the sand in question under this agreement.

Jean Bte. Dufresne died 5th March, 1872, the Respondents, his children, renounced to his estate.

They claim in this action compensation for the sand which the Appellants got under their agreement with Jean Bte. Dufresne.

The institutes sell sand from a property substituted, and the substitutes, afterwards coming into possession, sue the purchaser of the sand. The Court below has given them judgment.

Is this right ? I think not.

The institute is proprietor; if the substitute die before him, the substitution fails, becomes *caduque*; his sale includes his eventual right; his present right is that of proprietor, subject to defeasance if the substitution opens. He was consequently proprietor when he sold the sand. It was his act that caused it to be separated from the realty; by that act, however wrongful, it became personal property, over which he had the control and disposal as much as over an ordinary product of the soil; those who dealt with it are not necessarily wrong-doers to the substitutes, who only became proprietors of the thing substituted by acceptance of the substitution after it opened and in the condition that the thing substituted then was, but with the right of action against the institute for his deteriorations, for which he is the party responsible to the substitute. The fault of the severance and appropriation is that of the institute; the third party, Bulmer, only bought sand from the institute as he would have done from any one else. He was not pretending to deal with title to real estate, therefore cannot be held to have been bound to inspect the Register to determine in whom the title was. The action against a wrong-doer before the substitution opens belongs to the institute. If he himself is the wrong-doer he is liable to the substitute, at whose instance he might be enjoined before the substitution opens, or be liable to a

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demand *en déchéance*, and after it opens is bound to account to the substitute for any wrongful act of deterioration.

How does the substitute become vested with a right of action against Bulmer, the third party ? Not because Bulmer has profited, he did not, because he pays Jean Bte Dufresne ; even the sale at the time it was made was perfectly valid, and would have been so, had the realty itself been included, only subject to be vacated if the substitution opened; Bulmer, therefore, did no wrong. If the realty had been sold, the substitute would only have had his option of revendicating it into whatever hands it passed, or claiming the proceeds from the estate of the institute and thus comfirming the sale ; he could not have asked the money from each or either of the vendors through whose hands the property had passed

The case is not exactly parallel to that of a usufruct separated from the right of property ; for in that case there is, besides the usufruct, a present existing vested interest in the proprietor apart from the usufruct, which would give him an action as regards the capital ; here is no interest at all, but only a hope of having an interest. Where that hope is realized, the substitute is not necessarilly invested with the powers of protection which were vested in the temporary proprietor who preceded him, with regard to acts done in the time of such predecessor, but he has a right to call him to account for failure of duty in not fulfilling his trust. I can find no precedent for any such action as the present, and think that one should not be established ; my opinion would go to reverse the judgment of the Court below and to dismiss the action of the Respondents.

Thévenot d'Essaule and Pothier are considered leading authorities on the subject of substitutions. Had the law given any such action as the present, it would not have escaped the observation of these authors.

I make some extracts from their works, which I think indicate the extent to which they consider the law carries the remedies of the substitutes :—

Thévenot d'Essaule, (p. 156.) " Avant l'ouverture, le subs-" titué n'avait aucun droit, il n'avait qu'une espérance de " venir au fidéicommis...
" (157.) Quand le fidéicommis est ouvert, c'est un simple

" droit à la chose, *jus ad rem;* c'est-à-dire une action pour " demander la chose substituée.

" Le substitué a bien par l'ouverture un droit formé et " acquis pour demander la chose, comme je l'ai dit, mais il " n'est pas encore propriétaire, il n'a point encore *jus in re.*

" (207.) Le substitué reçoit la propriété du substituant " mais non du grevé, mais c'est du grevé qu'il reçoit la pos- " session.

" (221.) Puisque le grevé est plein propriétaire jusqu'à " l'ouverture, il administre le bien pour lui-même et en son " nom.

" (222.) Le grevé exerce toutes les actions en son nom " personel, et, nullement au nom du substitué.

" A cause de la charge qui lui est imposée de rendre les " biens il est tenu d'apporter, à la régie des biens, un soin " raisonable et la diligence qu'on apporte ordinairement à ses " propres affaires.

" S'il ne le fait pas, il est responsable de la perte ou du " dommage qui en resulte pour le substitué, lorsque la subs- " titution vient à ouvrir.

" (275.) Le grevé a le droit d'aliener pendant la condition " du fidéicommis. L'aliénation alors est valable, mais elle " n'est pas incommuable.

" (276.) Le grevé est propriétaire pendant la condition. Il " peut donc transférer la propriété ; à la vérité, la propriété " est résoluble.

" L'acheteur ne devient propriétaire comme l'était le grevé " son vendeur, qu'à la charge de cesser de l'être si le fidéi- " commis se réalise par l'arrivée de la condition.

" (243.) Le substitué, pendant la condition, n'a point de " droit formé, il n'a qu'un simple espoir de venir à la subs- " titution en cas qu'elle se réalise et s'effectue par l'arrivée de " la condition.

" Il est donc évident que ce substitué, pendant la condition, " ne peut exercer aucune action qui suppose un droit acquis.

" C'est une vérité qui a toujours été constante, étant fondée " sur la nature-même des choses."

Pothier, " Traité des Substitutions, " treating of the effects of substitutions, before they open, and the duties of the substitute, says, Sec. 5, Art. 1 :—

" Le grevé de substitution étant, avant l'ouverture de la

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" substitution, le vrai et seul propriétaire des biens substitués, " il suit de là que les actions, actives et passives, de la suc- " cession résident en sa seule personne.

" D'où il suit que ce qui est jugé sur ses actions avant l'ou- " verture de la substitution avec le grevé, doit tenir après " l'ouverture de la substitution ; et que lorsqque la chose a " passé en force de chose jugée, le substitué ne peut pas re- " venir contre...

" De ce que les droits et actions de la succession résident " en la seule personne du grevé avant l'ouverture de la subs- " titution, il suit aussi que la prescription contre les dits droits " et actions court et s'accomplit contre le grevé avant l'ou- " verture de la substitution, et que les dits actions et droits " ainsi éteints ne revivent pas au profit du substitué lors de " l'ouverture de la substitution.

Art. 3. " Notre troisième principe est, comme nous l'avons " dit, que *le substitué, avant l'ouverture de la substitution, n'a par rapport au bien substitué aucun droit formé, mais une simple espérance.*

" D'où il suit, 1°.—Que si le substitué meurt avant l'ou- " verture de la substitution, il ne transmet rien à ses héri- " tiers et la substitution devient caduque ,car n'ayant aucun " droit avant son ouverture, il n'avait rien qu'il pût leur " transmettre ; l'espérance s'évanouit par sa mort."

Sec. 6, Art. 2, § 1.—" L'effet de l'ouverture des substitutions " est que la propriété des choses substituées passe de plein " droit de la personne du grevé en celle du substitué. Quoi- " que le substitué devienne de plein droit propriétaire des " choses substituées, il n'en est pas néanmoins saisi de plein " droit, quand même la substitution serait à titre universel " et en ligne directe. Le grevé ou ses héritiers, nonobstant " l'ouverture de la substitution, demeurent, non plus proprié- " taires, mais possesseurs des choses substituées, et c'est du " grevé ou de ses héritiers que le substitué en doit obtenir la " délivrance.

" De là, il suit que les fruits des biens substitués appar- " tiennent au grevé ou à ses héritiers même depuis l'ouver- " ture de la substitution, jusqu'à la délivrance, ou du " moins jusqu'à la demande en délivrance.

§ 2.—" L'ouverture de la substitution donne au substitué " les mêmes actions que l'ouverture des legs donnés aux lé-

" gataires, savoir : 1° Les actions personelles, *ex-testamento*, H. Bulmer et al & T. O. Dufresne et al.
" que le substitué a contre le grevé, ou les héritiers ou
" autres successeurs du grevé pour la restitution des sommes
" et choses comprises en la substitution, avec les fruits des
" dites choses et intérêts qui peuvent être dus au substitué
" pour les détériorations que le grevé aurait pu causer par sa
" faute ou négligence aux biens substitués.

2° " L'action de revendication des immeubles compris en
" la substitution qu'a le substitué contre ceux qui les pos-
" sèdent, soit que ce soit le grevé ou ses héritiers, soit que ce
soit des tiers détenteurs.

3° " Il y a aussi hypothèque sur les biens propres du
" grevé, savoir pour la restitution des deniers comptants, et
" des effets mobiliers compris en la substitution, et pour les
" dommages et intérêts dus pour raison des dégradations
" faites aux héritages par la mauvaise administration."

It is thus manifest that the law allows the Institute great power over the substituted property. He is during his time proprietor, and would remain so if the substitute died before him. When the substitute survives him, his estate is still the possessor of the property, and would remain proprietor if the substitute refused to accept. It is from the estate of the Institute that the substitute receives and takes over the possession of the property, he may follow the realty or immoveable into the hands of strangers bacause it is that which the registration preserves to him, but for its use or abuse he has to look to the institute, who is bound to deliver it to him unimpaired; the taking of sand, while the institute lived, was a possessory act by which he wrongfully withdrew a product from the realty substituted, but it was an act which vested that product in himself, and rendered him or his estate liable to account for the wrongful act, but did not necessarily involve third parties in that liability to account. They dealt with the then proprietor, and themselves had no relation to the conditional title by which he was bound; he held by a conditional title which bound him and his estate in a certain eventuality to account; he took the risk of that eventuality, but did not impose it upon his purchasers. I hold it to be a fallacy that the institute was devoid of authority to sell; he could sell; he could even sell the real estate, but his sale would come to be voided by the survivorship of

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the substitute and his acceptance. I hold it also to be a fallacy that the puachaser of the sand had notice of the defeasable title. The registration of a substitution may be reasonable notice to all who have to deal with the title to the real estate involved, but not to those making ordinary transactions affecting personalty only. The late Chief Justice, Sir Louis Lafontaine, remarked in adjudging the case of Charpentier vs. Platt, that substitutions were *de rigueur* acknowledging the maxim. I do not think that an extreme protection should be extended to everything affecting them, and I think this has been done in the present case.

A comparison cannot be correctly made with other systems of law, where the institutions themselves are different and principles differently applied; but I may remark, that I believe the principle I contend for will be found to be recognized with regard to the tenant by courtesy under the English law, by reference to Viner's Abridgement, Verbo—Waste, Letter K No. 9, where it is stated :—Tenant by courtesy and tenant in dower shall be punished for waste done by a stranger." The reason there given is :—For he, in the reversion, cannot have any remedy but against the tenant, and the tenant shall have his remedy against the wrongdoer, and recover all in damages against him; for voluntary waste and permissive waste is all one to him that hath the inheritance; but if the waste be done by the *enemies of the King*, the tenant shall not answer for the waste done by them, for the tenant has no remedy over against them.

It is difficult [for one, not familiar with their system, to follow, through all their intricacies, the English cases which might be cited as precedents. I will not venture to do so, but will venture to refer to one American case, decided in the Supreme Court of New-York—Bates *vs.* Shraeder, 13 Johnson's Rep. p. 260, which seems to me illustrative of this point. It is there decided than an action of waste does not lie by the heir against the assignee of the tenant by the courtesy, but only against the tenant himself.

At the time the sand was taken, the rights of action, in regard to the property, were clearly in the Institute. It was through him, as possessor and master of these rights of action, that they had to pass to the substitute. He could only, in this case, pass a right of action against himself or

his estate. The realty was what was substituted, and that might he followed into other hands. Its integrity was preserved by the registration of the title; but the product, whether resulting from use or abuse, was not the subject matter of the substitution, was not preserved by registration, and in its nature involved only a recourse against the party accountable, under his relations of trust to the substitution. If even it were conceded to be an abstract right in the substitute, I think it is not one that third parties were under any obligation to know or notice, when dealing with the party in possession. My conclusion in the matter is, therefore, as above expressed.

We also give the opinion of Hon. Mr. Justice Tachereau, who dissented in the Supreme Court.

TASCHEREAU, J. IN SUPREME COURT.—In 1828, by her last will, Suzanne Pepin, widow of Toussaint Dufresne, bequeathed to her son, Jean Baptiste Dufresne, a certain lot of land with reversion to her said son's children, creating thereby a substitution in favour of the said children. Suzanne Pepin died in 1834. Under the provisions of the said will, Jean Baptiste Dufresne then took possession of the said lot of land as proprietor, subject to the said substitution, and held it as such until his death, in 1872. The substitution then opened, and the Respondents, the said Jean Baptiste Dufresne's children, became proprietors of the said lot of land, as substitutes under the said Suzanne Pepin's will. While he owned the said lot of land, under his mother's said will, Jean Baptiste Dufresne had sold to the Appellants the right to take and carry away from it all the sand they would require during a period of five years. The Appellants had duly paid to the said Jean Baptiste Dufresne the price of that sale, and removed from this lot, *before the said Dufresne's death*, that is to say before the Respondents became proprietors of it, a large quantity of sand, which the Appellants value at the sum of $5939.48. By their action in this case, the Respondents allege that their father, whose succession they have renounced had no right to sell this sand, and claim from the Appellants the value of it.

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I am of opinion that they have no action against the Appellants.

What was the nature of this sale by the Respondents' father of the right to take sand on this lot of land ? Undoubtedly, a sale of moveables, of moveable property..

The sale of a house to be demolished and carried away, the sale of the right to cut down the whole of the timber standing in a forest, the sale of the right to work a mine or a quarry, even for 60 years, is a sale of moveable property : 5 *Laurent, droit civil.* *Nos* 425 *to* 428.

And although before the house, or timber or minerals are removed, such a sale is considered a sale of moveables between the parties to it, only as soon as they are removed, the sale is likewise a sale of moveables and the materials are moveables towards all parties. 5 *Laurent, Droit civil, No* 439. *See also Dalloz. Répert, v. biens, Nos* 37 *to* 54.

Demolombe says : "Un bien, même immeuble par sa nature, devient meuble, lorqu'il est considéré, non pas dans son état présent, dans son union actuelle avec le sol, mais au contraire dans l'état futur et dans l'individualité distincte que lui donnera la séparation qui doit l'en détacher, lorsque par exemple vous considérez une forêt comme devant être abattue, et que vous y voyez non pas des arbres, mais du bois : lorsque vous considérez un bâtiment comme devant être démoli, et que vous y voyez non pas une maison, *universitas*, mais des pierres, du bois, du fer, *res singulæ.*—Nous devons donc considérer comme mobilières. 1o La vente d'une coupe de bois quelconque, nonseulement de taillis, mais encore de futaies aménagéès ou non aménagées : 2o La vente du droit d'exploiter une carrière, ou plus généralement la vente des matières minérales non encore extraites, mais destinées à l'être, même jusqu'à l'entier épuisement. *Demolombe*, 1 *Distinction des biens*, *Nos* 151 *à* 191. *Idem Nos* 404, 406.

The authorities and the jurisprudence are all one on this question. A large number of them are cited by Demolombe. I will only add *Pothier, des Choses, par.* 21, *and* 2 *Marcadé, page* 332.

It is clear then that the sale by Dufresne to Bulmer was a sale of moveables, and must consequently be ruled by the principles of the law on moveable property. Whether as regards the Respondents, Dufresne had the right to sell this

sand, I do not now consider. By the very fact that he sold it, that it was separated from the soil, and carried away, *before the substitution opened*, this sale must be considered as a sale of moveables, whether Dufresne had the right to sell it or not. The usufructuary even who cuts down a forest becomes proprietor of each price of timber as it is cut down. "Un usufruitier qui fait une coupe par anticipation, n'en devient pas moins propriétaire des arbres qu'il a coupés, "says *Demolombe*, 2 *Distinction des biens*, *N*° 397." Yet, the usufructuary clearly has not the right to cut down a forest on the land he holds. The proprietor has his action against him for stopping the waste, or to get security from him. As the timber is not sold to third parties, and carried away, he may even seize it. But if it has been sold and delivered, the proprietor has no action against the buyer.

Proudhon, after saying that the usufructuary of moveables has not the right to sell them, adds: "Mais cette décision, vraie en thèse générale, ne doit-elle recevoir aucune exception ? C'est ce que nous nous proposons d'examiner ici.

Si l'usufruitier, abusant de la position où il se trouve, se portait à vendre des meubles qu'il doit conserver, la vente ne serait pas sans effêt, dans l'intérêt de l'acquéreur qui aurait traité de bonne foi avec lui, parce qu'en fait de meubles la possession vaut titre et que si le propriétaire peut les revendiquer pendant trois ans contre celui qui les a acquis d'un tiers, sans son consentement, ce n'est que quand ils auraient été volés, ou quand ils les aurait perdus.

Ainsi, à moins qu'on ne compare à un voleur l'usufruitier qui vend les meubles soumis à sa jouissance, il faut convenir que le propriétaire ne pourra les revendiquer entre les mains de l'acquéreur : et encore en comparant une pareille vente à un vol, la prescription triennale éteint la revendication du propriétaire; d'où il résulte que dans l'une et l'autre hypothèse, la vente à des effets très réels, soit en ce qui touche aux intérêts du tiers acquéreur de bonne foi, soit en ce qui a rapport à la perte que le maître de la chose peut en souffrir. *Proudhon*, *Usufruit*, *N*° 1075.

And, if this is so with the usufructuary, who has no title to the ownership, how much more must it be so with the institute, who is proprietor. It is upon this principle, that an author of great weight, under the French Code says :

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" Quant aux biens meubles, le grevé en est propriétaire et les administre librement, sauf l'obligation d'en faire inventaire, de les vendre publiquement et de faire emploi du prix; c'est donc à lui de toucher tous les capitaux, de recevoir le remboursement des rentes, même le prix des immeubles vendus: le tuteur à l'exécution n'a aucun maniement de deniers. Mais, comme il est en général responsable s'il n'a pas fait toutes les diligences nécessaires pour que la charge de restitution soit bien et fidèlement acquittée, il a le droit de s'opposer à ce que les payements ne soient faits qu'en sa présence, et de prendre toutes les mesures conservatoires qui ne privent pas le grevé de l'exercice de son droit.

A défaut de ces mesures, tous les contrats que le grevé peut faire sur des biens meubles avec des tiers de bonne foi sont valables à l'égard des appelés, quand la tradition a précédé l'ouverture de leur droit." Coin-Delisle, Donat. et test. N° 34; Pothier, de l'hypothèque, ch. 2, sec. 1, art. 3, " les bois abattus devenus meubles n'ont pas de suite par hypothèque," et 3 Aubry & Rau, page 428.

In this case, Bulmer was a *tiers de bonne foi*, and bought this sand from Dufresne and carried it away before the substitution opened in favour of the Respondents.

I have so far considered the question under the supposition that the institute, like the usufructuary, has not the right to open mines, quarries or sand-pits on his property. And that is certanily the most favorable view of the case for the Respondents. Yet, I think I have established that, even with this concession in their favour, this action does not lie. Now let us see whether the institute has not that right: whether it is the case that his possession is simply like the possession of the usufructuary.

Laurent, on this says :

" Le grevé est propriétaire, mais avec charge de conserver et de rendre. Il a donc des obligations, tandis que le propriétaire n'en a point. Pour conserver, le grevé doit jouir et administrer en bon père de famille; il n'a pas le droit d'abuser, qui appartient au propriétaire dont le droit est absolu. L'obligation de conserver et de rendre, avec la conséquence qui en résulte, établit une analogie entre le grevé et l'usufruitier. On pose même comme principe que la jouissance du grevé est régie par les mêmes principes que la jouissance

de l'usufruitier. Cela est trop absolu. Le grevé est propriétaire, tandis que l'usufruitier n'a qu'un démembrement de la propriété ; le grevé jouit donc comme propriétaire et non comme usufruitier. Vainement dirait-on que de fait le droit du grevé n'a été qu'un droit de jouissance si la substitution s'ouvre, puisque dans ce cas tous les actes de disposition qu'il a faits viennent à tomber. Cela n'empêche pas que le grevé ait été propriétaire, car son droit n'est pas résolu ; s'il l'était, il n'aurait pas même eu la jouissance des biens, car l'institution serait censée n'avoir jamais existé. Cela est inadmissible ; donc il a été propriétaire et son droit de jouissance a été celui d'un propriétaire.

De là suit que les restrictions que la loi apporte à la jouissance de l'usufruitier ne s'appliquent pas à la jouissance du grevé. L'usufruitier doit jouir comme jouissait l'ancien propriétaire, il ne peut pas faire d'innovation dans la jouissance, quand même ces innovations seraient utiles. Ainsi il ne pourrait défricher un bois ; s'il a reçu un fonds boisé, il doit rendre un fonds boisé, quand même le défrichement serait un acte d'un bon père de famille. Il n'en est pas de même du grevé ; il jouit comme propriétaire, avec cette seule restriction qu'il doit conserver la chose pour la rendre : 14 *Laurent*, *Dr. civ.* *Nos* 575, 576.

Thévenot-D'Essaule, an authority of great weight, on the question, says as to the Character of the ownership by the institute :

Retenez donc bien, que dans ce fidéicommis conditionnel, la propriété appartient au grevé jusqu'à ce que la condition, dont le fidéicommis dépend, soit arrivée.

Tant que la condition est pendante, le grevé est véritablement et pleinement propriétaire : toutes les lois y sont formelles.

Observez même, que dans ce fidéicommis conditionnel la propriété du grevé, lorsqu'elle est résolue par l'arrivée de la condition, ne l'est point *ab initio* ; en telle sorte qu'il soit censé n'avoir point été propriétaire.

La propriété n'est résolue que *ut ex nunc*, et non pas *ut ex tunc*, comme disent les auteurs.

Il est toujours regardé comme ayant été réellement propriétaire jusqu'à l'arrivée de la condition. *Thévenot-D'Essaule*, *Substit.* *Nos* 576, 583.

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It is these principles, clear and undeniable as they are, which have been forgotten by the Respondents and the two Provincial Courts which have admitted their claim. To sustain the proposition that the institute has not the right to open mines, quarries or sand-pits, not one authority has been cited by the Respondents. The principles which rule his rights, are adverse to that proposition. Demolombe at N° 574, vol. V., on Donations, seems to admit that the institute has such a right and Laurent *loc. cit.*, it seems to me, clearly says so. However, this question is of no great importance in this case, according to my view of it, because I hold that even, admitting that the Respondents could have opposed the sale of this sand, and have prevented the appellants from carrying it away, they, not having done so, cannot now make Bulmer pay for it a second time: 14 *Laurent*, *Dr. civ. N°* 576. If they thought that their father, by selling this sand, deteriorated their property, or sold what he had not the right to sell, the law gave them ample means of protecting their rights. Art. 955 of the Code says: " If the institute deteriorate, waste or dissipate the property, he may be compelled to give security or to allow the substitute to be put in possession of if as a sequestrator." And the last part of art. 956 enacts that: " The substitute or his representatives may, before the opening, perform all acts of a conservatory nature connected with his eventual right, whether against the institute or third parties."

The Respondents suffer from their own laches, if they have suffered at all and I say to them: " *Vigilantibus non dormientibus subvenit lex.*" If they have suffered any damages, it is their father who is the cause of it, not Bulmer. They have not been able to cite a single case from the Roman times down to this day where such an action as this has been thought of. They come before us as inventors. All the books speak of the actions that the substitute has at the opening of the substitution; but none mentions this one discovered by the Respondents. Under the old law, the substitute had a legal hypothec on the institute's free lands for the dilapidations done on the property substituted. That is not so now, but that is a reason why the Respondents should have watched more carefully the administration of their father, not a reason to condemn the appellants. " C'est une

raison de plus pour surveiller scrupuleusement l'administration du grevé," says Favard de Langlade, Rep., substitution, page 318, No XXII.

And, it seems to me that, upon the face of it, the plaintiffs' action is not founded in law.

They allege that, by removing this sand, the appellants have detoriorated their property. But it appears at the same time by their own allegations, that, when the appellants did so, that property did not belong to them, but to their father, J. Bte. Dufresne. Now, I fail to see a *lien de droit*, any privity, between the respondents and the appellants. If they can claim damages done to a property which is theirs now, but which was not theirs when the damages were done, they must show how, in law, the claim for these damages, has accrued to them. It cannot be as heirs of their father, 1st because their father who was the vendor of this sand was paid for it, and could not consequently have had such a claim :

2° Because, had their father this claim, they have renounced his succession, inheriting this property not from him, but from their grand mother, *capit a gravante, non a gravato*, art. 962 C. C. I fail to see how they can claim damages done to the property of another, though this property has since become theirs without showing how the claim has vested in them.

This seems to me conclusive against the Respondents' demand. On the whole I do not see a single ground upon which the Respondents can recover against the Appellants. They had to take this property from their father, the institute, as he left it to them : "Les appelés prennent les biens dans l'état où ils se trouvent à l'ouverture de la substitution, says Laurent, 14 Dr. Civ. No 592." If there has been a deterioration of their property by the removal of this sand, it is their father who has done it and against their father's estate that they must proceed. If this estate is insolvent this surely is not a reason to give them a recourse against Bulmer. Their father alone is responsible towards them. Would it be pretended that if their father had extracted this sand himself, and gone to Montreal to sell it by the load the Respondents would have an action against the purchaser of each load ? Does it make a difference that, in the sale he made of it, the

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purchaser was obliged to extract it and carry it away himself?

The Respondents at the argument relied on art. 1053 of the Code, which enacts that every person is responsible for the damage caused by his fault to another. That is so, most undoubtedly, but where is Bulmer's fault here? he bought this sand from the possessor of it and paid for it. But, say the Respondents, he should have gone to the Registry office before buying it, and there he would have seen that this lot of land was substituted to us. This is a novel contention. I hold that, even with the certificate of the Registration of the substitution in his pocket, Bulmer could buy this sand as he did, and, that registration has nothing to do with moveable property. How every cord of wood that one buys on the market, according to this contention, one would have to go to the Registry office to see if this wood has not been cut by an institute on a substituted piece of land, as, by buying this wood, he would be exposed to pay it later a second time to the substitute.

This is where the Respondents' arguments would lead us.

For these reasons, I am of opinion that the action of the Respondents should be dismissed, that in the judgments of the Provincial Courts condemning the Appellants there is error, and that the appeal should be allowed, with costs in all the Courts against the Respondents.

Another question has been raised by the Appellants. They contend that the publication and insinuation of this substitution having been effected more than six months after the grantor's death, the substitution is entirely null and void. I am also with them on this point. Before the Code and in 1834, when Suzanne Pepin died, the *ordonnance de Moulins* was the law in force in Lower Canada on this point. It had been modified in France by the declarations of 1690 and 1712, but neither these declarations nor the *ordonnances des substitutions* of 1747 were never registered in the Conseil Supérieur, and consequently were never law for us. *Hutchinson & Gillespie*, in the privy Council, vol. 3, Revue de Législation, page 427. Now, by the said *ordonnance de Moulins, art.* 57, all substitutions had to be insinuated within six months, on pain of nullity. I refer on this to 3 Henrys, 396, 403; 4 Henrys, 40; Thévenot-Dessaule, pages 511, 513; 2 Bourjon,

page 178; 2 Arrêts de Louët, pages 646 & Seq; 2 Ferrière, Science des Notaires, p. 257; Rousseau de Lacombe, p. 700 et Seq.; 2 Montvallon, des successions, page 284; Furgole, des Subtitutions, p.p. 290 & 306; Sallé, l'Esprit des Ordonnances, vol. 2, p. 213; and Demolombe, 5 Donat. 458.

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The terms of the ordonnance are so clear and unambiguous, and the Respondents have so utterly failed to find a single authority in support of their contention on this point, that I feel convinced the learned Judges of the Court appealed from would also have come to the conclusion that the substitution in question here had lapsed and become a nullity, if their attention had been drawn to the fact that it is the law as it was in Lower Canada, in 1834, and not the Code that governed the case.

The terms of the ordonnance are as follows:

"Ordonnons aussi que dorénavant toutes dispositions entrevifs ou de dernière volonté, contenant substitutions, seront, pour le regard d'icelles Substitutions, publiées en jugement à jour de plaidorie, et enrégistrées à siéges royaux plus prochains des lieux des demeurances de ceux qui auront fait les dites Substitutions et ce dedans six mois, à compter, quant aux Substitutions testamentaires, du jour du décès de ceux qui les auront faites; et pour le regard des autres, du jour qu'elles auront été passées; autrement, seront nulles et n'auront aucun effet."

In this case the will creating a substitution not having been published and insinuated within six months from the testator's death, the Substitution had ceased to exist, and for this reason also, the plaintiff's action should be dismissed.

I am, however, alone in my opinion on this point as well as on the first point.

Judgment Confirmed.

H. W. Austin, *for Appellants.*

Geoffrion, Rinfret & Dorion, *for Respondents.*

MONTREAL, 28TH. MARCH 1883.

Corum DORION, C. J. MONK, RAMSAY, CROSS, BABY J.J.

Ex-parte.

PERCIVAL TIBBS

PET. FOR A WRIT

of Habeas Corpus.

Held : that the Court of Queen's Bench has the right to order the issue of a writ of *Habeas Corpus* to bring a prisoner detained for debt on a capias, before a magistrate to attend at the preliminary examination of the complaints and charges make against him for a criminal offence.

DORION, C. J.—This was a petition for *habeas corpus* to bring, before the police magistrate, Thomas A. Hodgson, who is confined in the common gaol of this District, under a writ of capias, in order that he may be present at the preliminary examination of certain criminal charges laid against him.

The petitioner alleges that Hodgson has been arrested under a warrant charging him with having given to the Bank of Montreal a warehouse receipt for cheese, and with having, without the consent of the Bank, or the production or delivery of the receipt, unlawfully alienated and appropriated the cheese mentioned in the said warehouse receipt; that Hodgson was admitted to bail and the petitioner and others became sureties for his appearance, and that he is bound to have him before the Police Magistrate on the 27th March, instant; that since the petitioner became bail, Hodgson has been arrested on a *capias* issued at the instance of the Bank of Montreal for a sum exceeding $100,000 and that he is now detained in gaol.

The conclusions taken are that a writ of *habeas corpus* do issue to bring Hodgson before the police magistrate to attend from day to day at the preliminary exanimation of the criminal complaints and charges laid against him.

In support of this application M. Kerr for the suppliant cited Bacon's abridgement vo. *Habeas Corpus*, 116; Rex vs. Woodham, 2 Strange Rep. 828; Hurd on *Habeas Corpus* and *Exparte* Griffiths, 5 Barnwell and Alderson, 730, to show the different purposes for which a writ of *Habeas Corpus* may be obtained.

The learned counsel also cited the case *Exparte* Dupuy *in re* Moïse Paquette, in which a similar application was made

and was granted on the 26th of April 1879, by the chief Justice, while sitting on the criminal side of the Court. **Percival Tibbs, petitioner for a writ of *habeas corpus*.**

The Court granted the writ ordering the gaoler to bring the prisoner before the police magistrate Mr. Desnoyers, from day to day, until otherwise ordered, to answer all complaints against him. Petition granted.

W. H. Kerr, Q. C. for petitioner.

Notes du Juge en chef Dorion dans l'affaire de Moïse Paquette.

Jugement 26 Avril 1879.

Devant Sir A. A. Doron juge en chef.

Ex-parte

LOUIS DUPUY.

Syndic à la faillite de Moïse Paquette.

PETITIONNAIRE.

Moïse Paquette a été arrêté sur un mandat d'arrêt émané par M. Desnoyers, Magistrat de Police, sur la plainte du Pétitionnaire, syndic à sa faillite, et il a donné caution qu'il comparaîtrait devant le Magistrat de Police à un jour ultérieur. Immédiatement après avoir donné caution, il a été arrêté sur capias émané à la poursuite de ses créanciers, et il a été logé en prison. Paquette ne pouvant comparaître pour répondre à la plainte formulée contre lui, le magistrat de police croit qu'il n'a pas d'autorité, en Vertu des Actes 32, 33 Vict. ch. 30, Sect. 6, 41, 42, 43 et 32, 33 Vict. ch. 29, Sect. 60, pour contraindre le Shérif a l'amener devant lui, (Archbold 17th Ed. p. 290,) l'espèce actuelle n'étant pas prévue dans ces actes.

C'est sous ces circonstances que le Syndic demande à la Cour un bref *d'habeas corpus* enjoignant au geôlier d'amener Paquette devant le Magistrat de Police, de jour en jour, jusqu'il ait adjugé sur la plainte pendante contre lui.

J'avais d'abord quelque doute sur le droit de cette Cour d'ordonner, par un writ *d'habeas corpus*, qu'une personne emprisonnée soit pour une offense criminelle ou en vertu d'une ordre émané d'une Cour civile, soit amenée devant un autre tribunal ; mais en référant aux autorités je me suis convaincu que ce droit existe.

Je trouve qu'en 1882 la Cour d'Echiquier, en Angleterre, a accordé un bref *d'habeas corpus* adressé au commandant de

Percival Tibbs, petitioner for a writ of *habeas corpus*.

la flotte, lui enjoignant d'amener un prisonnier qui y était détenu pour dette, devant un juge de paix, afin qu'il fût examiné, de jour en jour, sur une accusation criminelle portée contre lui.. (*Ex-parte* Griffiths, 5 Barnwell & Alderson 730.) Cependant en 1812 un bref *d'habeas corpus* pour amener devant un magistrat dans une autre comté, un prisonnier qui subissait une sentence pour délit, afin d'y formuler de nouvelles plaintes contre ce prisonnier, a été refusé. (*Reg.* vs. *Day* 3 Foster & Finlayson, 256.)

La Cour du Banc de la Reine a également refusé un *habeas corpus* pour amener un détenu sur accusation de meurtre, devant le coroner pour l'identifier, et cela parce qu'il pouvait être identifié autrement. Le juge Coleridge a, néanmoins, dans cette cause, exprimé l'opinion que la Cour aurait eu le droit d'accorder un bref *d'habeas corpus* dans un cas semblable, s'il y avait eu nécessité de le faire. (*Re Cooke*, 7, *Q. B*, 653.)

Dans la cause de *Graham* & *Glover*, 5 Ellis & Bl. 591, la Cour à ordonné qu'un prisonnier détenu pour dette serait amené sur un bref d'*habeas corpus ad testificandum* et le même ordre a été donné plusieurs fois à l'égard de prisonniers détenus sur des accusations pour crimes ou délits. (*Marsden vs. Overburry* 18 C. B. 34. *Greery vs. Hopkins* 2 Lord Raymond 851.)

Dans Ontario les Cours ont aussi ordonné que des personnes emprisonnées pour dettes seraient, sur *habeas corpus*, amenées devant un juge de-paix, même d'un autre comté que celui ou elles étaient détenues, pour répondre à une plainte ou accusation criminelle et même pour mépris de Cour. (Regina vs Phipps, 4 L. J., 160; Graham & Kingsmill, 6 Q. B. U. C. O. S, 584).

Si dans quelques cas les juges en Angleterre ont réfusé d'obtempérer à ces demandes d'*habeas corpus*, ce n'est pas parce qu'ils n'avaient pas le droit de les accorder, mais parce qu'il y avait un autre moyen d'arriver au résultat que l'on désirait obtenir, ou parce que les circonstances ne justifiaient pas l'emploi de cette procédure, ou encore parce que l'intérêt public exigeait qu'elles ne fussent pas accordées, comme si l'on voulait au moyen d'un *habeas corpus* faire sortir de prison pour une cause triviale une personne accusée de meurtre ou de qu'elqu'autre offense grave. Le juge a

dans la plupart des cas une discrétion à exercer. Ici l'intérêt public, exige que le détenu subisse son procès s'il y a lieu, sur la plainte qui a été portée contre lui, ou qu'il en soit déchargé s'il n'y a pas de preuves suffisantes, et cela ne peut être déterminé que par l'examen préliminaire qui doit avoir lieu en sa présence devant le magistrat de police. **Percival Tibbs, petitioner for a writ of *habeas corpus*.**

Le bref d'*habeas corpus* est accordé.

S. Pagnuelo, C. R., *pour le Pétionnaire.*

MONTRÉAL, 28 NOVEMBRE, 1882

Coram DORION, J. C., RAMSAY, CROSS, BABY, J.J.

No. 604.

WILLIAM MORGAN,

Demandeur en 1e. Instance.

APPELANT.

&

JAMES LORD & AL.

Défendeurs en 1e. Instance.

INTIMÉS.

Jugé. Qu'en vertu des articles 645 & 876 du Code de Procédure, un juge en chambre a le pouvoir de nommer un séquestre a une saisie d'immeubles lorsque cette saisie est retardée par quelqu'opposition.

DORION, J. C.—L'Appelant, condamné à payer aux Intimés une somme de $10,000, a inscrit la cause en révision. Il n'a pas comparu à l'audition et, d'après la pratique de la cour son inscription a été renvoyée. Il s'est alors pourvu en appel après avoir donné un cautionnement pour les frais seulement et un consentement à l'exécution du jugement. Les Intimés ont procédé à la saisie des meubles et des immeubles de l'Appelant, qui a fait une opposition, alléguant que la saisie de ses immeubles n'avait pas eu lieu dans l'ordre qu'il avait indiqué à l'huissier saisissant et il a conclu au renvoi de la saisie et subsidiairement à ce que les immeubles saisis fussent vendus dans l'ordre indiqué.

Les Intimés ont alors demandé la nomination d'un séquestre aux biens saisis et leur demande a été accordée par un juge en chambre.

L'appel est du jugement ordonnant la nomination d'un séquestre.—1° parce qu'en vertu de l'article 645 du Code de

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Procédure, le tribunal pouvait seul ordonner la nomination d'un séquestre et qu'un juge en chambre n'avait pas de juridiction pour le faire ; 2° qu'il n'y avait pas de raison pour justifier la nomination d'un séquestre.

D'après l'article 645 du Code de procédure "les immeubles "saisis restent en la possession du saisi jusqu'à l'adjudi-"cation ; mais si la vente en est arrêtée par quelqu'opposition, "le saisissant peut, suivant les circonstances et à la discrétion "du tribunal, obtenir la nomination d'un séquestre pour en "percevoir les revenus."

L'Appelant ayant fait une opposition à la saisie de ses immeubles, les Intimés étaient par là même autorisés à demander la nomination d'un séquestre, et le tribunal auquel la demande en était faite, s'il avait juridiction pouvait, dans sa discrétion, l'accorder ou la refuser. Mais quel est le tribunal compétent pour nommer un séquestre à une saisie d'immeubles dans le cas prévu ? l'art. 645 ne le dit pas. Il faut se reporter au chapitre qui traite du séquestre judiciaire où l'on trouve (art. 876) que ; "*Toute demande en séquestre est "formée par requête présentée à l'audience ou à un juge.*" Voilà le tribunal compétent dont il est question dans l'art. 645. Il n'y en a pas d'autre et il faut dire que tout juge de la Cour supérieure, soit qu'il exerce sa juridiction à l'audience ou en chambre, peut nommer un séquestre aux biens saisis dans le cas prévu par l'art. 645.

Dans notre système où la Cour supérieure et la Cour de circuit sont toujours présidées par un seul juge, il n'y a aucune raison pour donner à un juge siégeant à l'audience plus d'autorité qu'à un juge en chambre sur une matière urgente et dont l'instruction est toute sommaire. Il n'y a pas non plus de raison pour distinguer entre la procédure à suivre pour nommer un séquestre à des biens sous saisie et celle à suivre dans les autres cas où le séquestre peut être nommé. Il y aurait même de graves inconvénients à décider que dans le cas de saisie d'immeubles un séquestre ne pourrait être nommé que pendant les termes, ce qui équivaudrait à dire que dans la plupart des districts de la province où la Cour ne siège que trois ou quatre fois par année et pendant quelques jours seulement, une partie ne pourrait faire nommer un séquestre à des biens saisis que pendant ces quelques jours et que pendant dix à onze mois de l'année,

elle n'aurait aucun moyen de dépouiller le saisi, même pour lès raisons les plus graves, de la possession de ses biens. C'est pour éviter ces inconvénients que l'on a permis de demander la nomination d'un séquestre, soit à l'audience, comme cela se fesait sous l'ord. de 1667, tit. 17, art. 12, soit à un juge, ces derniers mots étant signalés par les codificateurs comme étant de droit nouveau. Wm. Morgan & Jas. Lord et al.

L'Appelant s'est appuyé sur ce que le mot tribunal se trouve dans la seconde partie de l'article 876, pour prétendre que la même expression dans l'article 645 ne pouvait s'appliquer à un juge en chambre, mais à la Cour même. Rien n'indique que telle ait été l'intention du législateur. Au contraire il semble que dans les deux articles, l'on s'est servi du terme tribunal comme s'appliquant à toute autorité compétente, et comme se référant soit à la Cour ou a un juge en chambre, autrement l'on se serait servi du mot audience qui se trouve dans la première partie de l'article 876.

Nous sommes donc d'opinion qu'un juge en chambre avait le droit de nommer un séquestre à une saisie d'immeubles.

Nous avons déjà dit en rapportant les termes de l'art. 645, que dans l'espèce le juge pouvait dans sa discrétion accorder ou refuser la demande pour séquestre.

Pour engager cette Cour a mettre de coté la nomination d'un séquestre faite par un juge dans l'exrcice d'un pouvoir discrétionnaire, il faudrait établir qu'il a exercé sa discrétion d'une manière arbitraire ou, au moins, déraisonnable. Or ici il appert au contraire que le juge, en nommant un séquestre n'a fait que remplir un devoir de justice.

L'Appelant, après avoir été condamné a payer à l'Intimé une somme considérable, veut retenir aussi longtems que possible la possession et les revenus de ses immeubles. Il commence d'abord par inscrire en révision, puis il abandonne son inscription afin de pouvoir appeler à cette Cour. Il appelle sans donner caution et consent à l'exécution du jugement, mais dès que les Intimés veulent faire vendre ses immeubles il fait une opposition tout à fait inutile, puisqu'en supposant ses allégués bien fondés il pouvait en tout temps obtenir sur simple requête un ordre au shérif de vendre ses immeubles dans l'ordre qu'il lui aurait indiqué. Tous les procédés de l'Appelant indiquent le désir de retenir ses immeubles en sa possession dans le seul but d'en retirer les

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revenus au préjudice des Intimés. Il nous semble que le juge qui aurait refusé de nommer un séquestre sous ces circonstances n'aurait pas exercé une saine discrétion.

L'art. 681 du code de procédure civile de France a été cité pour faire voir que la seule raison pour laquelle un séquestre pouvait être nommé à une saisie d'immeubles, c'est dans le cas ou le saisi détériore les biens saisis; mais cet article ordonne que si les biens ne sont ni loués ni affermés, le saisi en restera en possession, jusqu'à la vente, à titre de séquestre judiciaire, à moins qu'il n'en soit ordonné autrement par le président du tribunal. L'article 682 immobilise les fruits des immeubles saisis pour être distribués par ordre d'hypothèque, et si l'on a maintenu, dans quelques cas particuliers qu'un séquestre ne devait être nommé que si le saisi détériorait les immeubles saisis, c'est que les tribunaux ont trouvé que le saisi, contraignable par corps a titre de séquestre judiciaire, offrait des garanties suffisantes aux créanciers lorsqu'il ne détériorait pas les bien saisis. Les termes de l'article 681 ne sont pas restrictifs et Bioche, vo. *saisie immobilière*, nº 293, reconnait que même en France un séquestre peut être nommé pour détérioration ou autre raison grave. Pigeau dit même qu'il peut être nommé sans motifs, mais son opinion n'est pas généralement suivie.

Ici où l'on a ni le bail judiciaire, ni le séquestre d'office, si les créanciers ne pouvaient faire nommer un séquestre, ils seraient en quelque sorte à la merci des débiteurs de mauvaise foi qui, en prolongeant indéfiniment des contestations vexatoires, s'approprieraient pendant la saisie tous les revenus des biens saisis.

La Cour de première Instance a trouvé dans l'opposition de l'appelant à la saisie de ses immeubles et dans les autres contestations une raison suffisante pour nommer un séquestre, et son jugement est comfirmé.

Jugement confirmé.

S. Pagneulo, *pour l'Appelant.*
Geoffrion, Rinfret & Dorion, *pour les Intimés.*

QUEBEC, 5 OCTOBRE, 1882.

Coram DORION, J. C., MONK, RAMSAY, TESSIER, BABY, J. J.

No. 2.

LUDGER AYOTTE,

Demandeur en Cour inférieure.

APPELANT

&

C. A. P. BOUCHER & al,

Défendeurs en Cour inférieure

INTIMÉS

Succession.—Acceptation.—Dol.

JUGÉ,—Que l'acceptation d'une succession par un majeur n'est pas valable, si cette acceptation a été le résultat du dol.

2. Que dans l'espèce il y a eu dol. (*Diss.* Dorion, J. C., & Ramsay, J.)

TESSIER, J.—Les faits de cette cause peuvent se résumer comme suit :

Après diverses transactions qui ont eu lieu de 1863 à 1869, le docteur Boucher, le père des Intimés, s'est trouvé endetté envers Ludger Ayotte, commerçant, de la paroisse de Maskinongé, en une somme de $2,079, qui est réclamée en la présente cause.

Le Dr Boucher possédait, à titre de substitution de son père des biens qui revenaient à ses enfants du chef de leur aïeul. A part de cela il possèdait peu de choses en propriété à lui-même.

Le Dr Boucher mourut, sans avoir fait de testament, le 16 mars 1872, laissant une veuve, Susanne Salmon, et sept enfants, les intimés en cette cause.

Par notre Code Civil, art. 664, les héritiers présomptifs ont trois mois pour faire l'inventaire des biens de la succession, afin de connaître les forces, l'actif et le passif de la succession et quarante jours pour délibérer s'ils l'accepteront ou y renonceront.

Le créancier Ayotte n'attendit pas que ce délai fut écoulé ; mais quinze jours après le décès de leur père, il proposa aux enfants Boucher, les Intimés, et à la veuve, leur mère, de lui céder un droit de réméré sur une terre de feu le Dr Boucher, moyennant la somme de $100 ; ce qui faisait $50 pour la mère et $50 divisées entre sept enfants, à chacun $7.14.

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Cette cession fut ainsi passée le 2 avril 1872; mais la grave et terrible conséquence de cet acte, c'est que les enfants Boucher y prenaient la qualité d'héritiers de leur père, le Dr Boucher, et pour la minime somme de $50, se rendaient responsables de la créance de $2,079 contractée par leur Père envers le dit sieur Ayotte, et engageaient ainsi les biens substitués qui leur appartenaient du chef de leur aïeul.

C'est ce que cherchait le sieur Ayotte et le but de cette cession, obtenue avant que les enfants pussent connaître les affaires de la succession, n'était de la part d'Ayotte qu'un moyen d'assurer le payement de sa créance de $2,079.

Le sieur Ayotte a-t-il obtenu par dol cette déclaration d'héritiers de la part des enfants ? C'est la principale question qui va se développer.

Muni de cette déclaration d'héritiers, le sieur Ayotte a poursuivi les enfants Boucher, intimés en cette causes, pour la dite somme de $2,079.

Les Intimés ont plaidé une dénégation générale des faits allégués dans la demande et spécialement, par une autre défense, qu'ils n'avaient point accepté la succession du dit C. P. A. Boucher; qu'au contraire ils y avaient renoncé par acte, devant J. O. Chabot, notaire, le 23 mai, 1877, et qu'ils ne sont point en conséquence tenus de payer aucune des sommes réclamées par l'action; que l'acte de cession du droit de réméré du 2 avril 1872, invoqué par l'appelant comme étant de la part des intimés un acte d'acceptation de la succession du dit C. P. A. Boucher, aurait été consenti par les intimés, sans aucune cause ni considération quelconques, que le dit acte aurait été surpris aux Intimés par le dol et les manœuvres frauduleuses de l'appelant, et ils concluaient à ce que qu'il fût déclaré que l'acceptation qu'ils avaient faite, par le dit acte de cession, était le résultat du dol de l'appelant et qu'elle fût annulée et déclarée nulle et de nul effet.

La Cour de première Instance, par son jugement du 16 mars, 1882, a maintenu les prétentions des intimés, et renvoyé l'action de l'appelant.

C'est de ce jugement que l'appelant a interjeté appel.

La première question est de savoir si cette acceptation de la succession de leur père par les enfants a eu lieu par le dol pratiqué contre eux par l'appelant Ayotte.

Ce dol est parfaitement prouvé dans la cause, particulière

ment par le notaire Galipeau, et est admis par Ayotte dans son témoignage. Ces faits de dol sont si importants dans l'examen de cette cause, qu'il faut citer quelques parties textuelles de ces témoignages.

Le notaire Galipeau dit :

" C'est moi qui avais alors l'habitude de faire les actes du " demandeur ; j'étais alors et je suis encore le notaire qu'il " emploie ; je réside dans le village de Maskinongé, comme " le demandeur lui-même, à une distance de quelques arpents.

" Il n'y avait pas longtemps alors que feu Charles Paphenus " Anaclet Boucher était mort ; je ne me rappelle pas si l'in- " ventaire des biens de la succession du dit feu Charles Pa- " phenus Anaclet Boucher était alors fait ; dans tous les cas " la succession de feu C. P. A. Boucher passait alors pour in- " solvable, d'après la renommée ; c'était l'opinion générale " dans la paroisse.

" Je crois bien que le demandeur savait alors que la suc- " cession de feu Charles Paphenus Anaclet Boucher passait " pour être insolvable. Je suis d'opinion que la plus grande " partie des propriétés immobilières délaissées par le dit feu " Charles Paphenus Anaclet Boucher à son décès, n'apparte- " naient pas à ce dernier, mais étaient substituées à ses " enfants.

" QUESTION.—Le demandeur en cette cause ne vous a-t-il pas " dit ou donné à entendre qu'il savait alors que la dite suc- " cession était insolvable et que le dit bien était substitué aux " enfants ?

" RÉPONSE.—Dans le temps, je ne me rappelle pas qu'il m'en " ait parlé ; mais il n'avait pas besoin de m'en parler, il savait " dans le temps, que je connaissais ces choses. Il le savait " comme moi ; c'était chose connue.

" QUESTION.—Quand le demandeur vous a demandé de pré- " parer le dit acte de cession du droit de réméré, désirait-il " que le dit acte fût fait et reçu par vous, ou par un autre no- " taire ?

" RÉPONSE.—Il désirait qu'il fût reçu par moi.

" QUESTION.—Pourquoi n'avez-vous pas vous-même fait et " reçu le dit acte ?

" RÉPONSE.—J'ai préparé l'acte et, quand il a été préparé, " j'ai dit au demandeur que je n'aimais pas à recevoir cet acte- " là, parce que je connaissais la responsabilité qu'encourraient

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" les vendeurs, en se portant héritiers de leur père, et la dite " dame veuve Suzanne Salmon, en acceptant la communauté, " et que j'étais d'opinion qu'il y avait ignorance de droit de " la part des vendeurs, vu que je considérais la dite succes- " sion comme parfaitement insolvable.

" QUESTION.—Avez-vous dit alors au demandeur la raison " pour la quelle vous ne vouliez pas recevoir le dit acte ?

" RÉPONSE.—Je crois avoir dit alors au demandeur que je " n'aimais pas à recevoir cet acte, parce que les défendeurs ne " connaissaient pas la portée ou la responsabilité qu'ils assu- " maient en signant cet acte.

" QUESTION.—N'est-il pas vrai que l'intention du demandeur, " en faisant faire cet acte, était de faire faire acte d'héritiers " aux défendeurs ? Le demandeur ne vous l'a-t-il pas dit ou " fait entendre ?

" RÉPONSE.—Je sais que le demandeur savait que les défen- " deurs, en signant le dit acte de cession, se portaient héritiers " de leur père et se rendaient responsables des dettes de sa suc- " cession, et je suis d'opinion que cette connaissance a dû le " déterminer à faire la transaction qu'on lui offrait ; j'avais " dit moi-même au demandeur, qu'en signant cet acte, les dé- " fendeurs se portaient héritiers, et je l'avais dit à d'autres " aussi.

" QUESTION.—Le demandeur ne vous a-t-il pas dit ou donné " à entendre qu'il désirait faire consentir cet acte par les dé- " fendeurs, afin qu'ils devinssent responsables des dettes de " leur père ?

" RÉPONSE.—Le demandeur m'a demandé si les défendeurs, " en signant cet acte, se rendaient responsables des dettes de " leur père ; je lui ai dit que oui ; il m'a demandé si c'était " bien certain, je lui ai répondu que c'était bien certain, en " loi ; je ne sais pas si le demandeur a dit d'autres choses, mais " je suis sous l'impression que c'est en grande partie ce qui l'a " déterminé à faire faire cet acte de cession ; je l'ai compris " ainsi. "

Ajoutons à cela le témoignage de Ludger Ayotte, l'appelant. Entre autres choses, il dit :

" RÉPONSE.—Le dit C. P. A. Boucher, lors de son décès, ne " passait pas pour solvable, vu les dettes contractées par lui et sa " famille ; mais suivant moi lorsqu'il avait besoin de quelque " chose, ou d'un petit montant, on ne le lui refusait pas.

" QUESTION.—Le dit L. E. Galipeau ne vous a-t-il pas dit, " après avoir préparé le dit acte de cession, qu'il était prêt à " le recevoir, pourvu que, suivant son habitude, il en expli- " quât la nature et les conséquences aux défendeurs ?

" RÉPONSE.—Il m'a dit qu'il ne voulait pas recevoir le dit " acte parce qu'il croyait que, par le consentement du dit acte, " les défendeurs se portaient héritiers, et qu'il croyait que si " les défendeurs savaient qu'en signant cet acte, il devenaient " responsables des dettes de leur père, ils ne signeraient pas " cet acte. Le dit L. E. Galipeau ne voulant pas recevoir le " dit acte, j'ai envoyé chercher le notaire Fusey.

" QUESTION.—N'est-il pas vrai que vous étiez alors et que " vous êtes encore sous l'impression que les défendeurs n'au- " raient pas signé le dit acte, s'ils avaient cru, en le signant, " se rendre responsables des dettes de leur père ?

" RÉPONSE.—Je crois que les défendeurs n'auraient pas signé " le dit acte, s'ils eussent pensé, en le signant, se rendre res- " ponsables des dettes de la succession de leur père, vu qu'ils " contestent cette action aujourd'hui.

" Lors de la passation du dit acte, j'étais aussi sous cette " impression. "

Voilà donc les fait bien prouvés. Le créancier Ayotte a tendu un piége à ces enfants Boucher pour leur faire accepter la succession de leur père, quinze jours après sa mort, avant le délai donné par la loi pour en connaître les forces et y renoncer ou l'accepter. Il leur a caché à dessein la portée de l'acte qu'il leur faisait signer, pour leur faire accepter d'une main de leur créancier cinquante piastres, et de l'autre main engager pour deux mille piastres leur responsabilité et leurs biens substitués.

Nos lois et notre jurisprudence française, essentiellement fondées sur la bonne foi, qualifient-elles de *dol* un acte semblable ?

Pothier, Vente, No. 236, dit : " La bonne foi oblige non seulement à ne rien dissimuler des vices intrinsèques de la " chose, mais en général à ne rien dissimuler de ce qui con- " cerne la chose qui pourrait porter l'acheteur à ne pas acheter."

Aussi il fut jugé par la Cour de Cassation que : " Le silence " gardé par un créancier connaissant le mauvais état des af- " faires de la succession, lorsqu'en sa présence on annonce " aux héritiers que la succession offrait un actif important,

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" déclaration qui a déterminé ceux-ci à accepter purement et " simplement, a pu être déclaré constituer un dol au moins " par réticence, lequel donne aux héritiers un droit de se faire " restituer contre leur acceptation. "

" 41 Dalloz, 32 Journal du Palais, p. 617, 618, 625, Réper- " toire Vo. *Succession* p. 275, No. 520 : On peut commettre un " dol par une simple dissimulation ou par une réticence : " *sicuti faciunt qui per ejus modi dissimulationem desservunt et* " *tuentur vel sua vel aliena. Non solum qui obscure loquitur, ve-* " *rum etiam qui insidiose dissimulat.* " 6 Touillier 35, 36, 58, 59, 60, 86 à 88. 1 Bédarride, du dol et de la fraude, Nos. 94, 97, 99, 100 ; Art. 984, 991 C. P. C.

9 Laurent p. 350, No. 296, cite un arrêt de la Cour de Cassation à l'effet qu'une quittance non rédigée par le successible, dans la quelle on lui aurait donné le titre d'héritier, n'avait pas eu l'effet de le rendre héritier pur et simple, et que le successible n'avait pas eu l'intention d'accepter la succession.

Notre Code Civil, art. 650, prononce l'acceptation de la succession par le majeur valide excepté " *dans le cas où cette ac-* " *ceptation a été le résultat du dol.* "

C'est ce qui est arrivé ici. Il n'y a pas de délai fatal pour renoncer à une succession ou se faire relever de l'acceptation, excepté que l'héritier eut recélé ou diverti des effets de la succession. Code Civil, art. 659.

On a voulu établir que les enfants avaient fait appréhension des biens mobiliers de la succession ; il est évident que c'est leur mère, la veuve survivante, qui a fait cette appréhension de biens dont elle avait la moitié. C'est ainsi que les $100 payées pour le réméré ont été remises en entier à la mère.

Cette dame a agi de bonne foi, elle a employé le peu de biens que laissait son mari à payer les dettes urgentes de sa succession, ses frais funéraires, les dépenses nécessaires de la maison et de la famille, dont elle était le chef. Ces actes ne peuvent lier les enfants ; ils n'ont été que des agents passifs, innocents, obéissant aux ordres de leur mère.

Il n'y a pas là une intention des enfants d'accepter la succession de leur père. Suivant les autorités, il faut les deux éléments, l'acte et l'intention.

" Toute appréhension des biens de la succession ne renferme " pourtant pas toujours la volonté d'être héritier et n'est par " conséquent pas toujours un acte d'héritier ; il faut examiner

" dans quel esprit il le fait, s'il se met en possession de quel-
" ques héritages de la succession, etc.

" Un fait n'est acte d'héritier que lorsqu'il suppose néces-
" sairement la volonté d'être héritier dans celui qui le fait. 8
" Pothier (édit. Bugnet), p. 115 à 117 ; 6 Aubry & Rau, 4 édit.,
" p. 388, 389.

" Il ne suffirait donc pas aujourd'hui que l'intention d'ac-
" cepter fût très-probable, très-vraisemblable, ni qu'elle parût
" même résulter évidemment de la nature de l'acte et de
" toutes les circonstances de fait. Il faut qu'elle en résulte
" nécessairement, c'est à dire que l'acte d'où l'on prétend l'in-
" duire ne puisse recevoir aucune autre explication et n'ait
" pas absolument pu être fait dans une autre intention que
" celle de se porter héritier.

" En vain le juge serait convaincu, comme homme, que le
" successible, en faisant cet acte, a eu certainement la volonté
" d'accepter. Il ne s'agit pas ici d'une question de fait que le
" juge pourrait décider comme un juré, etc."

On a objecté que les intimés Boucher auraient dû offrir de remettre les cinquante piastres reçues de l'appelant Ayotte ; mais il faut remarquer : 1o. que Ayotte ayant reçu la terre en vertu du réméré, il a eu bonne considération pour son argent ; 2o. que cette somme ne reviendrait pas à lui, mais ne serait payable qu'au curateur représentant la succession vacante du Dr Boucher ; 3o. que ce point n'a pas été mis en contestation.

Cette Cour est donc d'opinion que le jugement qui a été rendu en première Instance, relevant les intimés de leur prétendue acceptation de la succession de leur père, leur donnant acte de leur renonciation à cette succession et déboutant l'action de Ludger Ayotte est correct, et il est confirmé avec dépens.

Dorion, J. C. (*diss.*)—L'Appelant a porté cette action pour recouvrer des Intimés, en leur qualité d'héritiers de la succession de feu Charles A. P. Boucher, leur père, la balance que celui-ci devait à l'Appelant personnellement pour partie, et pour partie, comme représentant la ci-devant société de

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Ayotte & Marchand en vertu d'une cession que Olivier Noé Marchand, son associé, lui a faite de ses droits dans l'actif de la société.

Les Intimés ont repondu à cette demande. 1o. par une dénégation générale. 2o. qu'ils n'avaient pas accepté la succession de leur père, mais qu'au contraire ils y avaient renoncé le 23 mai 1877, par acte devant Chalut, notaire ; que l'acte de cession de droit de réméré du 2 avril 1872, invoqué par l'Appelant comme étant une acte d'acceptation de la part des Appelants, de la succession de leur père, aurait été consenti par les Intimés sans cause ; que cet acte aurait été surpris, aux Intimés par le dol et les manœuvres frauduleuses de l'Appelant, et ils concluaient à ce que l'acceptation qu'ils auraient faite par cet acte de cession fut annulée comme étant le résultat du dol de l'Appelant. 3o. que l'acte de transport par Marchand à l'Appelant ne leur aurait pas été signifié.

M. Boucher, père, est décédé le 16 mars 1872. Après la mort de leur père, les Intimés ont continué à vivre avec leur mère, en partie, en réalisant les meubles et recevant les créances qui appartenaient à la succession de leur père. Le 2 avril 1872, ils ont cédé avec leur mère à l'Appelant pour la somme de $100, un droit de réméré qui avait appartenu à la communauté de biens qui avait existé entre M. Boucher et sa femme et ils ont pris, dans cet acte, la qualité d'héritiers de leur père. Ils ne pouvaient du reste, vendre qu'en cette qualité, puisqu'ils n'avaient pas d'autre titre à cette faculté du réméré.

Les Intimés prétendent que c'est leur mère qui est demeurée en possession des meubles et créances de la succession et que, s'ils ont reçu quelque chose, il ne l'ont fait que pour elle et en agissant en son nom. En supposant qu'il en serait ainsi, cela n'expliquerait pas le fait que les Intimés se sont déclarés les héritiers de leur père, par l'acte du 2 avril 1872 et que comme tels ils ont vendu une propriété de la succession et en ont reçu le prix.

" Il est hors de doute, (dit Laurent T. 9, No. 32, en citant Chabot de l'Allier), que le successible fait acte d'héritier lorsqu'il dispose à titre onéreux ou à titre lucratif d'un bien meuble ou immeuble de l'hérédité. "

C'est aussi ce qui a été jugé à l'unanimité par cette cour dans la cause de Bétournay & Moquin & al—(5 Legal News,

327; 2 Décisions de la Cour d'Appel, 187.—Dans cette cause deux des héritiers présomptifs avaient vendu pour $54.17 chacun, leur part dans un immeuble dépendant de la succession de leur père, et avant d'avoir reçu cette somme ils avaient renoncé à la succession de leur père.

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La Cour a néanmoins déclaré que par cette vente ils avaient accepté la succession de leur père et qu'ils étaient par là privés d'un douaire qu'ils réclamaient, et dont la valeur excédait vingt fois leur part du prix de vente.

Le montant reçu, quelque minime qu'il soit, n'y fait rien ; car, comme le dit Loisel (liv. 2, T. 5, Sect. 3, No. 319), dans son langage énergique : " Mais qui prend des biens de succession jusqu'à la valeur de cinq sous fait acte d'héritier."

L'on a cité des autorités pour établir que l'on ne pouvait accepter une succession, si l'on n'avait pas l'intention de le faire, sans remarquer que ces autorités ne s'appliquent qu'à une acceptation tacite que l'on veut faire résulter de faits, qui comportent une acceptation ou non, suivant l'intention du successible. Mais lorsque l'appelé à une succession fait un acte qui n'est pas susceptible de deux interprétations, et qui implique nécessairement qu'il agit en qualité d'héritier, comme lorsque prenant dans un acte la qualité d'héritier il vend un bien de la succession et qu'il en reçoit le prix, il ne peut plus y avoir lieu à rechercher qu'elle a été l'intention du successible puisqu'il a déclaré en termes exprès, qu'il entendait se porter héritier ; et les autorités citées sont sans application aucune à un cas semblable. L'héritier ne peut alors se faire relever de son acceptation, que pour les raisons mentionnées dans l'art. 650 c. c., c. a. d. pour dol, violence ou parce qu'il aurait découvert un testament inconnu au moment de l'acceptation.

Les Intimés sont dans le cas que nous venons d'indiquer. Ils ont pris la qualité d'héritiers, ils ont vendu un bien de la succession et en out reçu le prix. S'ils ont été induits à faire ces actes par des manœuvres frauduleuses ou par violence, ils peuvent se faire relever de leur acceptation à deux conditions, la première, en prouvant la fraude ou la violence, et la seconde, en rapportant ce qu'ils ont reçu.

" L'acceptation d'une succession (disent Aubry & Rau T. 6. " § 611 p. 370), est de sa nature irrévocable et ne peut être ré- " tractée par le successible. . . .

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" *Qui semel hæres semper hæres.* La renonciation que ferait " l'héritier après avoir accepté serait considérée comme non " avenue à l'égard des tiers. "

Il résulte de là, que l'héritier qui a une fois accepté, ne peut renoncer à son acceptation et qu'il n'a que la demande en rescision pour se faire relever. Cette demande peut-être faite soit par action directe, soit par exception et ce, dans les cas prévus par l'art. 650 c. c. déjà cité, correspondant à l'art. 783 du Code Français. (Demolombe T. 14, No. 527, 528, 541, 554 & 556.)

Ce n'est qu'après avoir fait annuler son acceptation qu'il peut renoncer et, pour renoncer, il est tenu de rendre tout ce qu'il a reçu comme héritier. (Aubry & Rau T. 6 pp. 385, 6 ; Demolombe T. 14 No. 537, 544, 568 ; Laurent T. 9, No. 367).

Les auteurs du Nouveau Denisart, Vo. Adition d'hérédité, § 13, No. 8, disent à l'égard de cette rescision :

" L'effet de la restitution contre l'acceptation d'une suc-" cession est que celui qui est restitué est déchargé de tous " les engagements qui sont la suite de l'adition de l'hérédité, " par exemple, de l'acquittement des dettes et legs du défunt ; " mais il faut pour obtenir cette décharge qu'il rende compte " de tout ce qui lui est parvenu des effets de la succession et " *qu'il remette le tout soit aux creanciers, soit a l'héritier qui* " *doit recueillir les biens à son défaut.* "

No. 9 " *Dans tous les cas le compte doit être rendu en présence* " *des créanciers de la succession.* "

Duranton T. 6 No. 467; Dalloz Rec. Alp. Vo. Succession No. 528; Demolombe T. 14, No. 556, énoncent les mêmes règles.

Les Intimés n'ont pas fait rescinder leur acceptation de la succession, et il n'ont pas remis ce qu'ils avaient reçu. Ils ont cru qu'il leur suffisait, après avoir accepté la succession, d'y renoncer pour être déchargés du paiement des dettes. Il leur fallait se faire relever, rapporter ce qu'ils avaient reçu en leur qualité d'héritiers, c'est-à-dire, remettre les choses entières, pour pouvoir ensuite renoncer à la succession. Leurs procédés étaient tout à fait irriguliers, et ils ne devaient pas réussir.

Maintenant, quant au droit des Intimés de se faire relever, tous les auteurs admettent que l'erreur et la lésion ne sont pas au nombre des causes qui peuvent faire rescinder l'acceptation d'une succession. (Laurent T. 9, No. 356 ; Demolombe T. 14, No. 535.

L'art. 650, C. C., de même que l'art. 783 C. N., ne reconnaissent que deux raisons qui puissent faire relever un héritier de son acceptation d'une succession, le dol, et la découverte d'un testament inconnu lors de l'acception.

Dans l'espèce actuelle, cette dernière raison n'existe pas.

Il n'y a donc que le dol qui pourrait être une cause de rescision de l'acceptation que les Intimés ont faite de la succession de leur père. Tout en se plaignant, par leurs défenses, qu'ils n'auraient pas accepté la succession sans le dol et les manœuvres de l'Appelant, ils n'ont articulé, ni spécialisé, aucune des manœuvres dont ils se plaignaient en termes généraux, et à l'enquête, ils n'en ont prouvé aucune.

L'appelant n'a fait aucune représentation, soit directement, soit indirectement pour les engager à vendre leur droit de réméré, et par là, à accepter la succession de leur père. D'après la preuve, l'on serait porté à croire que ce sont eux qui ont fait les démarches pour vendre ce droit de réméré, et qu'ils l'ont fait offrir au Demandeur.

Cela n'a, du reste, aucune importance, ce qui est important c'est de connaître si l'appelant a fait quel qu'acte frauduleux pour tromper les Intimés, et leur faire accepter la succession de leur père. Or, comme nous venons de le dire, il n'y en a pas un mot de preuve; mais l'on veut faire résulter la fraude de ce que l'Appelant savait que le succession était insolvable, et qu'il savait, de plus, que les Intimés en fesant l'acte du deux avril, mil huit cent soixante et douze, se rendaient responsables des dettes de la succession, et qu'il ne les en a pas informés.

D'abord, quant à l'insolvabilité de la succession, le fait était notoire, les Intimés devaient le connaître, et ils n'ont pas tenté de prouver qu'ils ne le connaissaient pas. Quant à la responsabilité que les Intimés encouraient en acceptant la succession de leur père, c'est là une pure question de droit et les Intimés sont comme tout autre censés connaître la loi; mais, l'on a essayé de prouver qu'ils ne connaissaient pas la loi en fesant dire à des témoins qu'ils croient que si les défendeurs avaient su qu'ils s'engageaient à payer les dettes de la succession, ils n'auraient pas signé l'acte du 2 avril 1872. Mais ce n'est là qu'une opinion fondée uniquement sur ce que l'acte était désavantageux pour les Intimés. Qui peut dire que les Intimés

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n'avaient pas l'intention de payer les dettes de leur père par respect pour sa mémoire et que ce n'est pas, parce qu'ils avaient cette intention, qu'ils sont demeurés en possession de tous ses biens pendant cinq ans et plus, sans renoncer à sa succession, et en fesant dans l'intervalle des actes d'héritiers. Il n'est pas prouvé que l'Appelant ait dit un seul mot pour les porter à croire qu'en signant l'acte ils ne se rendaient pas passibles des dettes. Mais l'on dit encore que l'appelant connaissait la responsabilité que les Intimés allaient encourir et qu'il aurait dû les en informer. Pour soutenir, cette prétention extrême, il faudrait d'abord prouver que les Appelants ne le savaient pas. Puis où trouve-t-on qu'il y ait obligation pour une partie d'informer la partie avec laquelle elle transige des droits que celle-ci peut avoir, où des risques qu'elle encourt en fesant la transaction ? La réticence sur un fait connu de l'une des parties peut quelquefois et, suivant les circonstances, être considérée comme un dol suffisant pour annuler une transaction, quoique même dans ces cas là, c'est plutôt l'erreur, que le dol, qui est la véritable cause de rescision. Mais je ne connais pas d'exemple où l'on ait annulé une transaction parce que l'une des parties n'a pas informé l'autre d'un droit qu'elle avait ou qu'elle perdrait en fesant la transaction.

Les Intimés n'ont cité aucune autorité ni aucun précédent pour appuyer une telle proposition. L'arrêt le plus favorable que les Intimés aient cité à l'appui de leurs prétentions est celui de Bourdonnay C. Ve. Bourdonnay Duclesio, rapporté dans le Recueil de Dalloz, année 1839, 1. 41 ; mais il n'y a aucune parité entre les deux causes. Dans celle de Bourdonnay il était prouvé que trois des Défendeurs, créanciers du défunt, pour engager les héritiers à accepter la succession de leur père, leur avaient représenté que l'actif de la succession excédait le passif de 350,000 à 400,000 francs ; que les représentations avaient été faites en présence de deux autres créanciers, aussi défendeurs, qui, sachant que ces représentations étaient fausses, avaient assumé par leur silence, la responsabilité de ces déclarations faites dans leur intérêt. Sur cette preuve, la Cour Royale, infirmant le Jugement de la Cour de première Instance, a relevé les héritiers de leur acceptation, et ce jugement a été confirmé, comme il devait l'être, par la Cour de Cassation.

Dans la cause actuelle, le dol n'est pas prouvé, et il ne reste

que la prétention des Intimés qu'il n'auraient pas cédé leur droit de réméré, s'ils avaient su qu'ils se rendaient, par là, responsables des dettes de la succession de leur père. Mais comme une erreur de fait ne serait pas même une cause de rescision de l'acceptation d'une succession, (Art. 650 C. C., art. 783 C. N. Laurent, T. 9, No. 356. Demolombe, T. 14. No. 535, et Duranton, T. 6. No. 459,) à plus forte raison, l'erreur de droit qui, le plus souvent, comme dans ce cas-ci, n'est ni prouvée, ni surceptible de preuve, ne peut pas en être une.

Les Intimés ont, par leurs défenses, prétendu que l'appelant ne pouvait recouvrer la créance due à la société Ayotte & Marchand, parce que le transport de Marchand n'avait pas été signifié. Cette question ne peut faire de difficulté. L'Appelant était co-propriétaire par indivis. En lui cédant sa part de l'actif de la société, Marchand n'a fait qu'attribuer à l'Appelant sa part dans la société, en lui assignant ce qui lui appartenait déjà à titre de co-propriétaire. Si au lieu d'un transport, l'on avait fait un partage et que cette créance fût échue au lot de l'Appelant, personne n'oserait prétendre qu'il aurait fallu signifier ce partage avant de porter l'action. Or, le transport n'a que l'effet qu'un partage aurait eu, (art. 747 c. c.) et il n'était pas nécessaire de le signifier.

Sur le tout, je suis d'opinion que le Jugement de la Cour de première Intance devrait être infirmé ; d'abord, parce que les Intimés ne pouvaient se faire relever de leur acceptation, sans au moins rapporter ce qu'ils avaient reçu de la succession ; et, en second lieu, parce que les Intimés n'ont pas prouvé que l'Appelant fût coupable de dol ; et enfin, parce-qu'en supposant que les Intimés n'aient consenti l'acte du 2 avril, mil huit cent soixante-douze, que sous l'impression qu'ils n'acceptaient pas, par là, la succession de leur père, cette erreur ne serait pas une cause suffisante pour les faire relever de leur acceptation.

RAMSAY, J. (diss.)—The question raised by this appeal is as to whether the respondents have accepted the succession of their late father Dr. Boucher. The Appellant contends that they have done so impliedly and expressly. First, that after their father's death, they continued to live in their father's

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house till the death of their mother, that in her lifetime they collected the debts due to their father, used the furniture, animals and money belonging to the succession as if they were their own. Under the evidence I think this is not made out. The children seem only to have done conservatory acts and those of administration, and this for their mother, and it does not seem that they have in any of these transactions taken the quality of heirs, C. C. 646.

Secondly, the appellant pretends that in a deed of cession they took the quality of heirs. This is admitted, but the respondents say that they were induced to do this by the fraudulent machinations of Appellant. I don't think this is proved. The notary Galipeau says they did not know the consequences of the deed, and that Appellant did, and it seems likely enough that the Appellant wanted them to sign the deed as an act of heirship; but I don't think this is fraud. Ayotte was not obliged to put them on their guard as to the legal consequences of their act, and it no where appears that he made any false or incorrect statement as to the facts. All they can say is that they were in error, but error is no ground for setting aside an acceptance of a succession. C. C. 650.

I am, therefore, to reverse.

Jugement confirmé.

Turcotte & Paquin, *procureur de l'Appelant.*

Hould & Grenier, *procureurs des Intimés.*

MONTREAL, 25th. JANUARY, 1883.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 406.

WILLIAM K. NEWMAN

Appellant.

&

JAMES J. NEWMAN

Respondent.

A bequeathed to B the annnal interest, during life, of a sum of £400 and the principal to C., who was also made universal legatee and testamentary executor. B sued C as executor for $576, being the amount of arrears of interest accrued on his legacy.

The Court below, on the ground that the assets in the hands of the Executor were deficient, gave judgment for $20.70 as being the balance of interest on the sums of money actuallay in the hands of the Executor.

Held: reversing the judgment of the Court below that B was entitled to a judgment against the estate represented by C for the full amount of arrears of interest due; that there was no evidence that the assets were insufficient to pay eventually the whole claim and that the question of sufficiency or insufficiency of the assets would only properly come up, on the execution of the judgment.

DORION, C. J.—By this action the Appellant claims the sum of $576 as a balance of arrears of interest, on a bequest, which his late father Ashburnham Cecil Newman made to him by his last will, for the term of his natural life, of the annual interest on the sum of £400 currency.

The Respondent who is impleaded as the Executor of the estate of the testator, after reciting in his plea the several dispositions contained in the will, alleges that the assets of the estate left by the testator consisted in the sum of $11,821, balance of the price of a property which he, the Respondent,

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had purchased from him before his death, which sum was payable as follows, to wit; $317.28⅐ on the 23rd of June 1847 and $1917.28⅐ on the 23rd of June of each of the years 1870, 1873, 1876, 1879, 1882 and 1885 without interest; and that the only sums available to pay the Appellant in the years 1868, 1869 and 1870, was a sum of $58 in principal, the interest of which amounted to $3.48 per year, or $10.44 for the three years, and $402 in the years 1871, 1872 & 1873 the interest of which amounts to $24,12 per year, or $72,36 for the three years, which added to the sum of $10,44 makes a sum of $82,80, out of which he had paid $62,10 to the Appellant, leaving a balance of $20,70 which he had tendered to the Appellant and which he brought into Court.

The superior Court has declared the tender valid and has dismissed the Appellant's action with costs.

The respondent is sued as Executor and he can only be condemned in that capacity. The suit is against the estate represented by the respondent and not against the respondent personally.

The first question therefore to be determined is whether the Appellant has a claim against the estate and to what amount, and not whether the respondent is bound to pay that claim if he really has no sufficient funds in his hands. In the present case the Appellant claims $576, and it is proved that he has received $62,10 on account, leaving a balance of $513.90 which was due by the estate when the action was brought. There is no contestation on this point. For this balance the Appellant asks for a judgment against the estate and he is no doubt entitled to that judgment, whether the estate is solvent or not. The question, whether he is entitled to be paid in full or only in the proportion to which the assets may bear to the amount due by the estate, will properly come up when the Appellant seeks, to enforce his judgment either by a *saisie arrét* in the hands of the respondent, as Executor,

or by some other legal process. In the meantime the Respondent should in his capacity of Executor and as representing the estate have been condemned to the balance due to the Appellant. W. K. Newman & J. J. Newman.

But is it true that there are not sufficient assets to pay all the legacies which the testator has made by his will, there being no other debts as admitted by the respondent himself? If we take the figures given in the Respondent's plea, the assets consist in the sum of $11,821 due by him to the estate, part of which was due when the action was brought and part payable in several payments, without interest, the last of which becomes due on the 23rd of June 1885.

The legacies made by the testator consist of $4100 bequeathed to four of his children and of $4800 the annual interest of which is given to three other of his children, of whom the Appellant is one, during their natural life, and the principal to the Respondent. There is therefore $11,821 of assets to pay $8900 of debts or a surplus of $2,921 subject to a rebate for interest on the instalments until they become payable.

As long as this last sum of $2,921 is not exhausted for the payment of interest the respondent has full security for the principal bequeathed to him, since the whole sum is in his own hands. It is only when the assets shall by the payment of interest have been reduced to $8900, which is not likely to take place, that the respondent will be entitled to claim that the payments to be made on the several legacies be reduced according to art. 885 c. c. in the proportion that the value of the saveral legacies would bear to the amount available to pay them.

The Court below has only allowed to the Appellant the interest on the balance of the instalments actually due by the Respondent on the price of his purchase, he retaining the principal.

The effect of this is that the Appellant will lose a large

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proportion of his interests, since he is only allowed $82.80 instead of $576 which is due, while the Respondent has in his hands not only the principal of $1600 on which he has to pay interest to the Appellant, but also $2921 which he will retain as universal legatee. By this operation the special legatee would loose a large proportion of his legacy while the universal legatee would receive a large proportion of the estate. The rule is different and the universal legatee is only entitled to what remains of the estate, after the special legatees have been paid in full.

The question as to what amount the Respondent is now bound to pay to the Appellant can only come up when the Appellant attempts to execute his judgment and this should be calculated on the amount actually due by the respondent, and not on the interest of that amount, as was done by the Court below. In the meantime the Appellant is entitled to his judgment against the Respondent as representing the estate of the testator for the whole amount of interest which is due him and the judgment of the Court below is therefore reversed.

Judgment reversed.

Mr. Butler, *for Appellant.*

MM. Laflamme & Laflamme, *for Respondents.*

MONTREAL, 24th MARCH 1883.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 367.

ALEXANDER SAUNDERS,

Defendant in the Court below,

APPELLANT;

&

THE COMMERCIAL MUTUAL BUILDING SOCIETY,

Plaintiffs in the Court below,

RESPONDENTS.

Held:—That a special mortgagee third in rank, obtaining legal subrogation in the rights of a general mortgagee first in rank, covering the same and other property, would not be allowed to use his recourse so as to defeat the equities of a second mortgagee, if the mortgagee first in rank was amply secured on the other property affected by it; but in the present case, Held:—That the Respondents, having bought from the firm of Sternberg & Co. a certain property hypothecated to the Royal Institution for the advancement of learning for a certain sum of money, and having obtained by paying this sum to the Royal Institution a legal subrogation against Appellant, Vendor to Sternberg & Co. who had undertaken in his deed of sale of the said property to Sternberg & Co. to discharge it from said hypothec, was entitled to recover this amount from the Appelant, altho he had failed to claim payment of his first mortgage and had ranked for the third mortgage on the property affected by the three mortgages.

CROSS, J.—The appeal in this case is instituted from a judgment rendered by Mr. Justice Jetté, in the Superior Court at Montreal, on the 30th April 1881, condemning Saunders to pay to the Building Society, a sum of $1,033.43 with interest, on a demand arising out of the following controversy:

The society instituted their action on the 2nd April 1880, claiming that the sum in question was due them in virtue of deed of sale from Saunders to a firm of Sternberg & Co., of date the 5th February 1875, whereby Saunders had undertaken to pay this sum to the Royal Institution for the advancement of learning, mortgagees of the property conveyed by said deed. The society alleged that they had been forced to pay the Royal Institution, Saunders having failed to do so although thereto bound as well by the deed last mentioned, as by his own deed of purchase of the same, with a larger extent of property, from McGauvran & Tucker, in whose discharge he had thereby agreed to pay the prior mortgages; McGauvran & Tucker having made a like undertaking when they purchased the same property from one Ouimet.

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Saunders met the action by pleas to the effect :

1st. That the society had never obtained a valid subrogation nor had they ever signified to Saunders the deed of the 22nd October 1879, by which they pretended to claim subrogation ;

2nd. That the society had been paid out of the proceeds of the property which Saunders had conveyed to Sternberg & Co. and had no claim against Saunders ;

3rd. That the obligation assumed by Saunders in favor of Sternberg & Co. by the deed of the 5th February 1875 to pay off the prior mortgage to the Royal Institution, had been discharged and renounced to by Sternberg & Co. by deed of 27th October 1879, whereby they also acknowledged a balance of $1,350 as due on the property they so purchased from Saunders.

On the proof. The deed of the 5th February 1875 shewed that Saunders undertook to pay the Royal Institution.

By a deed dated 22nd October 1879 the Royal Institution acknowledged to have received from the society $1,033.43 as the balance due them on the property in question, for which a discharge was granted, with the declaration that the society demanded subrogation in their rights and privileges, and a grant of subrogation so far as might be necessary.

On the 9th July, 1877, Sternberg & Co. hypothecated the property in question specially to the society, for a loan obtained from them of $2,000. For a portion of this they obtained judgment against Sternberg & Co. on the 4th of April 1879 ; in execution of which judgment the property was brougt to sale and purchased by the society for $2,010.

The deed from McGauvran & Tucker to Saunders shewed that Saunders had undertaken to pay the Royal Institution.

Saunders made divers payments to the Royal Institution for which discharges were obtained, but a balance still remained due to them, and a larger balance remained due from Sternberg & Co. to Saunders, which they acknowledged by the deed of the 27th October 1879, in which they Sternberg & Co., discharged Saunders from his obligation to pay the prior mortgage to the Royal Institution.

On the proceeds of the property sold at the instance of the society, they were collocated not on the prior claim of the Royal Institution for which they had obtained subrogation,

but on their own claim for which they had taken a special hypothèque by the deed of the 9th July 1877, this collocation being for the sum of $1,614.50.

There is no doubt of the case being one in which the society was entitled to obtain a subrogation under § 1 of article 1156 C. C., and that it did obtain a subrogation. As to the necessity for registration and signification there was none, the property had been sold and the proceeds distributed. If of any avail it could only be as a personal claim, and in regard to that there was no interfering creditor.

The society had clearly not been paid out of the proceeds of the property. The question was whether they had a right to rank for their special hypothèque, without destroying their claim for the payment they made to the Royal Institution.

The learned judge of the Court below considered that inasmuch as the sum for which the society was collocated on the proceeds of the property in question as above mentioned, was drawn on a different claim than the one sued for, viz.: on the obligation with special hypothèque granted to them by Sternberg & Co., 9th July 1877, for their loan of money, and not on the claim to which they had been legally subrogated to the rights of the Royal Institution by their payment and demand of the 22nd October 1876, that the society were not thereby debarred from recovering of Saunders the amount so paid by the society to the Royal Institution, and he gave the society judgment for the amount.

If no other controlling fact came in to influence the case, it appears to me that the conclusion so arrived at would have been erroneous.

The object of the law in granting legal subrogation in certain cases, is not to give an advantage to the party subrogated so as to defeat the equities of other claimants, but it is to protect him from the injustice he might suffer, if a prior hypothèque was urged to his prejudice, in such a manner as to absorb the proceeds of the property specially mortgaged to him as a subsequent creditor, when the more general hypothèque covering other property could be paid out of the other property, leaving the proceeds of the property specially mortgaged, or whatever might be available thereof, to go to the satisfaction of the subsequent special hypothèque. When the first and third claims become vested in the same creditor

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by the third obtaining subrogation of the first, he cannot so conduct his recourse as to defeat the rank of the second.

Besides this, there is another feature in the present case. In the sale by Saunders to Sternberg & Co. the obligations of the two parties were reciprocal. Saunders undertook to pay the prior obligations, and Sternberg & Co. undertook to pay Saunders the price. While both obligations remained unfulfilled, one could be set off against the other in this sense ; if Saunders demanded the price, Sternberg & Co. could say, you must first pay the Royal Institution against whose claim you have undertaken to protect me. And altho the discharge granted by Sternberg & Co. to Saunders, of date the 27th October, 1879, might have no operation as regards the society subrogated, yet the society could have no greater rights against Saunders, than could have had their debtor Sternberg & Co. who was also the debtor of Saunders. It follows that if Saunders could have defended himself against Sternberg & Co., he can also set up the same defense against the society. Saunders says : if I remained under obligations to Sternberg & Co. they remained my debtors to a larger amount, I have a right to set one off against the other, your claim against me cannot hold. As regards the rights acquired by such a subrogation, the case is well put by Troplong, Privilèges et hypothèques, vol. 5, p. 320 ; Dalloz, Jur. Gen., Vo. Hypothèques et Privilèges, pp. 415 and 416, Boisselin vs. Boucot.

This reasoning is applicable, and probably should have controlled the case in the sense claimed by the Appellant, save for a further complication, from the fact that Saunders was himself party to the deed of obligation from Sternberg & Co. to the society, of date the 9th July 1877. He intervened in that deed, and renounced his priority of hypothec in favor of the society, that is his hypothec of *bailleur de fonds* ; the effect of this would be, that if he used this claim to compensate the amount due the Royal Institution, it would become exhausted and leave the proceeds of the property to be taken by the society on the hypothec granted them by Sternberg & Co. Saunders could not object, because he had given this claim priority, and if he did not oppose compensation, he remained liable on his personal obligation to Sternberg & Co. The society as their creditor and entitled to all their rights, could insist on Saunders clearing the property purchased by Stern-

berg & Co. of this hypothec, in consequence of his personal undertaking to do so, and thus leave the proceeds realised from it free to be taken by them on their special hypothec.

In his purchase from McGauvran & Tucker Saunders assumed this liability; it was therefore part of his purchase money, and he had value for it in his hands by the property which represented it; he was bound to have that property clear in the hands of Sternberg & Co. to entitle him to recover the price from them, and by his own undertaking towards the society, he was bound to give their claim preference over his own for the price.

His right to set off any personal demand against Sternberg's claim on him for warranty, could not have availed him in any demand at the instance of the Royal Institution for what was due them on their mortgage; He owed that mortgage personally, and the property was hypothecarily bound for it. If he himself paid this personal debt he could not recoup himself by claiming it out of the proceeds of the property, to the prejudice of the society to whom he had given a priority on these proceeds, and if he could not so claim, it follows that the society taking the rights of the Royal Institution, could ask him to pay his own debt, and exclude him in regard to it from the proceeds of the property on which he had given them a preference.

Judgment confirmed.

Robertson, *Fleet* & *Ritchie*, for Appellant.
Kerr, *Carter* & *McGibbon*, for Respondents.

QUÉBEC, 7 DÉCEMBRE, 1882.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS & BABY, J. J.

GERMAIN ROY.

Défendeur en Cour de 1ère Instance.

APPELANT.

&

ZÉPHIRIN PINEAU, ESQUALITÉ ET AL.

Demandeurs en Cour de 1ère Instance.

INTIMÉS.

Emilie Michaud a légué tous ses biens à Jean Corriveau, son mari, à la charge de les transmettre à ceux de ses enfants ou petits enfants qu'il désignerait, et à telles charges qu'il jugerait à propos de leur imposer. Corriveau par une disposition universelle a légué tous ses biens à cinq de ses petits enfants, issus de son mariage avec Emilie Michaud, à la charge que si quelques uns d'entr'eux décédaient en minorité et sans enfants, leurs parts appartiendraient au frère suivant en âge, et à défaut de frère, à la sœur suivant en âge de ceux ainsi décédés, et qu'à défaut de frères et sœurs, ces parts accroîtraient aux autres légataires. Jean Corriveau étant décédé, l'un de ses créanciers a obtenu un jugement contre ceux des Intimés qui, en leur qualité de tuteurs, réprésentent les légataires universels, et il a fait saisir et vendre par le shérif un immeuble que l'Appelant a acheté, et qui était grevé de substitution pour une moitié en vertu du testament d'Emilie Michaud, leur aïeule maternelle, et pour l'autre moitié par le testament de Jean Corriveau, leur aïeul paternel.

Les Intimés qui, depuis le Jugement, ont été autorisés à accepter le legs fait par Emilie Michaud, et à renoncer à celui fait par Jean Corriveau, réclament de l'Appelant la moitié indivise de cet immeuble, comme leur appartenant en vertu de la substitution créée en leur faveur par le testament de leur aïeule Emilie Michaud.

Jugé: 1o. Que le testament d'Emilie Michaud contient une substitution des immeubles qu'elle a laissés dans sa succession, en faveur de ses enfants ou petits enfants qui seraient choisis par son mari Jean Corriveau.

2o. Que Jean Corriveau a pu faire ce choix par une disposition universelle, et comme il l'a fait par son testament.

3o. Que, quoique en général celui qui est chargé de transmettre à d'autres, des biens qui lui sont légués, ne peut les grever d'une nouvelle substitution, néanmoins Corriveau ayant été autorisé par le testament de sa femme à imposer telles charges qu'il jugerait à propos à ceux qu'il choisirait, pour recueillir les immeubles qu'elle lui avait laissés, a pu les grever d'un second dégré de substitution, en faveur d'autres petits enfants qu'il aurait eu le droit d'appeler en premier lieu.

4o. Qu'une substitution testamentaire, quoique non enregistrée dans le délai de six mois à compter du décès du testateur, est néanmoins valable quant à tous ceux qui n'ont contracté avec le grevé, qu'après qu'elle a été enregistrée, en quelque temps que cet enregistrement ait eu lieu. Germain Roy & Zéphirin Pineau

5o. Que quoiqu'un tuteur ne puisse accepter une succession ou un legs pour les mineurs qu'il représente que sur avis de parents et sous bénéfice d'inventaire, néanmoins un jugement condamnant purement et simplement un tuteur à payer une dette de l'auteur des mineurs qu'il représente, peut devenir chose jugée contre les mineurs, (sauf recours contre leur tuteur,) et les lie vis-à-vis du créancier qui a obtenu ce jugement.

6o. Que le décret fait sans opposition a l'effet de purger les substitutions ouvertes, et que cela s'applique aussi bien aux mineurs qu'aux majeurs.

7o. Que le décret ne purge pas les substitutions non ouvertes.

8o. Que les intimés, comme représentant les Appelés au premier degré en vertu de la substitutiou créée par le testament d'Emilie Michaud, leur aïeule, ne peuvent réclamer la moitié de l'immeuble adjugé à l'Appelant qui provient d'elle, parce que la substitution était ouverte lors du décret et que leurs droits ont été purgés.

9o. Que le jugement de la cour de première Instance, qui a déclaré les Intimés propriétaires de la moitié de l'immeuble en question, doit être infirmé, sous la réserve des droits des appelés au second dégré de substitution, dans le cas où cette substitution s'ouvrirait en leur faveur.

Les Intimés Zéphirin Pineau, Cyriac Béjin et Obéline Bouillon, Jean *alias* Johny Corriveau, en leur qualité de Tuteurs aux petits enfants de feu Jean Corriveau et de feu Emilie Michaud, avec Jean *alias* Josué Corriveau, l'un des petits enfants, majeur, et Octave Ross, curateur à la substitution créée par le testament de la dite Emilie Michaud, ont porté cette action pour recouvrer de l'Appelant la possession et propriété de la moitié indivise d'un immeuble désigné en leur déclaration et qu'ils allèguent appartenir aux mineurs qu'ils représentent, et au dit Jean *alias* Josué Corriveau, comme appelés à la substitution créée par la dite Emilie Michaud, leur aïeule.

L'Appelant a plaidé à cette action que les Intimés n'avaient pas de titre à cet immeuble et qu'il l'avait acheté à une vente par le shérif du District de Rimouski, le 20 octobre, 1880, dans une cause de Hamel vs. Pineau et autres, en vertu d'un jugement que le demandeur Hamel avait obtenu contre les Intimés, le 23 Septembre, 1877.

Les Intimés ont répondu qu'ils n'étaient pas les parties

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défenderesses dans la cause de Hamel et que depuis le jugement du 23 septembre 1877, ils avaient renoncé à la succession de feu Jean Corriveau, ainsi qu'au legs universel qu'il leur avait fait par son testament pour s'en tenir à la substitution créée par le testament de feu Emilie Michaud; que cette renonciation a mis fin au jugement du 23 septembre 1877 et que le décret, qui a eu lieu le 20 octobre 1880, est d'une nullité absolue ; que dans tous les cas le décret ne peut valoir que pour la moitié indivise du dit immeuble dépendant de la succession de leur aïeul Jean Corriveau.

La cour de première Instance a maintenu les prétentions des Intimés et les a déclarés propriétaires de la moitié indivise de l'immeuble réclamé par leur action.

Dorion J. C.—L'immeuble réclamé par les Intimés a-t-il été substitué en leur faveur en tout ou en partie par les testaments de feu Jean Corriveau et d'Emilie Michaud leurs aïeuls ?—Cette substitution, en supposant qu'elle ait eu lieu a-t-elle été purgée par le décret fait sur les Intimés, le 20, octobre 1880 ? Telles sont les deux questions principales que présente cette cause.

Le 8 mai 1856, Emilie Michaud a fait son testament et a légué à son mari Jean Corriveau tous ses biens, à la charge de transmettre ses biens immeubles, soit par donation entre vifs, ou par testament, à l'un ou à plusieurs de leurs enfants, ou petits enfants, dans la proportion qu'il croirait convenable et aux charges qu'il voudrait y spécifier. Elle est décédée peu de temps après, laissant dans sa succession la moitié indivise de l'immeuble que l'Appelant possède, et qui faisait partie des biens de la communauté qui a existé entr'elle et son mari Jean Corriveau.

Après le décès de sa femme, Jean Corriveau a fait un testament par lequel il a legué tous ses biens, tant ceux qui lui avaient été légués par sa femme Emilie Michaud, que ses biens propres, à ses petits enfants Emilie Chalou, Jean Thomas enfant d'Auguste Corriveau, Joseph, enfant de Jean Corriveau, Joseph, fils d'Etienne Corriveau, et Elizabeth Pineau, pour être partagés en cinq parts égales, dont une pour chacun de ses légataires ; et il ordonna que si l'un de ses légataires décédait en minorité et sans enfants, la part afferrant à ce légataire appartiendrait à l'enfant mâle suivant

en âge dans la famille de ce légataire, et que s'il n'y avait pas d'enfant mâle à sa sœur suivant en âge, et qu'à défaut de frères et sœurs, il y aurait accroissement en faveur des autres légataires.

Un testateur peut léguer ses biens à la charge que son légataire les transmettra à une, ou à plusieurs, d'entre les personnes indiquées. Ce legs crée une substitution fidéicommissaire en faveur des personnes choisies par le légataire, si ce choix a été fait conformément aux dispositions du testateur, et en faveur de toutes les personnes indiquées, si le légataire n'a pas fait de choix. Ricard, des substitutions. T 2 p. 453-4 nos 63, 65 et 66. Pothier des substitutions n° 80 Thévenot d'Essaulle ch. 68, n° 1007 p. 335.

Corriveau pouvait par une disposition universelle faire le choix de ceux qui devraient recueillir les immeubles que sa femme lui avait légués à charge de substitution. (Pothier des substitutions, Ed Bugnet No. 83. Ricard, des Subs. Ed. de 1701. T. 2 p. 460. Bretonnier, Quest. not. p. 432.)

Il ne peut y avoir de doute que par son testament Corriveau a exercé la faculté d'élire qui lui avait été donnée, puisqu'il a fait par son testament même la distinction entre la moitié de l'immeuble en litige qui lui provenait de sa part dans la première communauté et dont il a donné l'usufruit à sa seconde femme, de la moitié qu'Emilie Michaud, sa première femme, lui avait léguée à charge de substitution.

Une autre observation sur l'élection faite par Corriveau, c'est que, quoiqu'en général celui qui est chargé d'élire, ne peut grever d'une nouvelle substitution, les biens qu'il est chargé de rendre, cependant Corriveau était autorisé à le faire par la disposition faite en sa faveur et qui lui permettait d'imposer à ceux qu'il choisirait, telles charges qu'il jugerait à propos de spécifier. (Ricard, Des subs. Ed. 1701. T. 2, p. 463-4 ; Bretonnier, Quest. not. No. 432 ; ord. des Testaments Art. 63.)

Mais Emilie Michaud est décédée avant le Code et son testament n'a été enregistré que le 9 juillet 1858, plus de deux ans après son décès. Ce défaut d'enregistrement dans les six mois du décès de l'auteur de la substitution a-t-il eu l'effet d'annuler la substitution, même à l'égard de l'appelant, qui n'a acquis l'immeuble substitué que postérieurement à la date de l'enregistrement ?

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Nous ne nous serions pas douté que l'on pût aujourd'hui soutenir l'affirmative d'une telle proposition. Cependant elle l'a été tout récemment, (1) et avec une apparence d'autorité, qui nous oblige à l'examiner, puisque la même question se retrouve dans cette cause ci. En effet si les appelés à la substitution, qui sont les Intimés, ont perdu leurs droits, pour n'avoir pas fait enregistrer le testament de lenr auteur dans le délai de six mois à compter de son décès, il n'y a pas lieu de rechercher quel est l'effet du décret d'un immeuble compris dans la substitution qui leur a été faite par le testament de leur aïeule, si cette substitution n'existait plus lors du décret. Il ne resterait qu'à infirmer le jugement de la Cour de première instance en déclarant la substitution caduque faute d'enregistrement dans les délais requis par la loi.

Pour établir la nullité ou la caducité de la substitution l'on fait ce raisonnement : avant le Code la publication et l'enregistrement des substitutions étaient régis par l'article 57 de l'Ordonnance de Moulins, (de 1566,) qui exigeait que cette publication et enregistrement se fissent dans les six mois du décès du testateur, auteur de la substitution, et ce à peine de nullité. Les déclarations de 1690 et de 1712 n'ont jamais été enregistrées au Conseil Supérieur de Québec, et les modifications qu'elles ont apportées aux dispositions de l'ordonnance, n'ont pas été reçues en Canada. La publication des substitutions, qui depuis l'acte 18 vict. ch. 101, se fait au moyen de l'enregistrement, au bureau de l'enregistrement des testaments portant substitution, devait donc, avant le code, être *faite* dans les six mois du décès du testateur et ce à peine de nullité, selon les dispositions de l'Ordonnance.

Il est vrai que l'article 57 de l'Ordonnance de Moulins exigeait la publication des substitutions "*et ce dedans six mois à compter, quant aux substitutions testamentaires du jour du décès de ceux qui les auront faites ; et pour le regard des autres du jour qu'elles auront été passées ; autrement seront nulles et n'auront aucun effet.*"

L'article 58 de la même Ordonnance contenait une disposition semblable relativement à l'insinuation des donations, qui devait être faite "*dans les quatre mois à compter du jour*

(1) Bulmer & al, et Dufresne & al *Ante* p. 114.

et date des donations pour le regard des biens et personnes étant dans le royaume et dans six mois, pour ceux qui seraient hors du royaume, autrement et à faute de cette insinuation, seraient " *et demeureraient les* dites donations nulles, et de nul effet et " valeur." Germain Roy & Zéphirin Pineau

Mais ces dispositions tant à l'égard de la publication pes substitutions, que de l'insinuation des donations, n'ont jamais été interprétées, par les tribunaux, comme prononçant une nullité absolue des substitutions ou donations qui n'avaient pas été publiées ou insinuées dans les délais prescrits ; mais seulement une nullité relative, que ceux qui avaient acquis des droits sur les biens substitués ou donnés avant la publication des substitutions ou l'insinuation des donations, en quelque temps que cette publication ou insinuation eussent été faites, pouvaient seuls invoquer. De fait les déclarations de 1690, de 1712 et plusieurs autres, qui ont précédé l'Ordonnance de 1717, étaient plutôt des lois déclaratoires pour servir à l'interprétation de l'Ordonnance de Moulins, conformément à la jurisprudence établie, que des lois prescrivant des règles nouvelles.

Ainsi Ricard, avocat et auteur contemporain, (son premier traité sur les donations ayant été publié en 1583,) qui nous a laissé le plus estimé de tous les commentaires sur les substitutions qui aient été écrits dans la langue française, au T. 2, p. p. 513 et 514, nº 141, de son traité des donations, Ed. de 1702, s'exprime comme suit.

" Comme la publication requise par cette ordonnance " (l'Ord. de Moulins), n'est pas de la formalité substantielle " de l'acte, ainsi que nous avons fait voir ci-dessus, mais " seulement pour rendre la substitution publique, et faire " qu'elle ait son effet à l'égard d'un tiers, il s'en suit, l'acte " étant parfait en soy, qu'en quelque temps que la publica- " tion soit faite, elle commence à produire son effet, cncore " qu'elle soit faite longtemps après les six mois portés par " l'Ordonnance et l'effet de ce que cette ordonnance requiert " que la publication soit faite dans les six mois, se renferme " en ce qu'étant faite dans ce temps, elle rétroagit au temps " du testament et de la donation ; en sorte qu'elle a la force " de rompre les aliénations faites entre ces deux temps, au " lieu qu'étant faite après les six mois, elle ne rétrograde " point et son effet ne commence que du jour qu'elle est

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" faite, si bien que les aliénations faites cependant tiennent " au préjudice des fidéicommissaires."

Le même auteur T. 1. p. 283, nº 1258, dit à l'égard de l'insinuation des donations : " Que si le donateur est encore " vivant, après que le temps porté par cette ordonnance est " expiré, la donation peut encore être valablement insi- " nuée etc."......

" La cour l'a ainsi jugé par un premier arrêt donné au " rapport de M. Le Grand, le 8 mars 1578...Il y a eu un pareil " arrest intervenu en la cinquième chambre des enquêtes, au " rapport de M. Louet, et ces deux arrests ont été suivis de " plusieurs autres de sorte que cette maxime passe pour cons- " tante parmi nous."

L'on trouve encore ce qui suit dans une note au bas de la page 527–des Œuvres de Domat, T. 1, Ed. de 1756.

" L'ordonnance de Moulins requiert la publication dans les " six mois à peine de nullité, cependant l'usage a toujours " été que la publication pouvait se faire en tout temps, avec " cette différence que quand elle est faite dans les six mois, " elle a un effet rétroactif et les créanciers intermédiaires ne " peuvent prétendre aucune hypothèque sur les biens substi- " tués. *Cet usage a été confirmé par la déclaration du* 17 *novembre* 1690."

Nous trouvons dans les actes de notoriété, recueil de Denisart, p. 210 le passage suivant d'un arrêt du 7 juin 1701, signé par Le Camus et Brochard.

" L'on a toujours jugé, même avant la déclaration de 1690, " que les substitutions n'étaient pas nulles, faute d'avoir été " publiées ; qu'en tout temps un mineur devenu majeur ou " autres personnages qui y ont droit, les peuvent faire pu- " blier avec cette différence que, lorsque la publication avait " été faite dans les six mois du jour du décès, elles avaient " un effet rétroactif, et que tous les créanciers intermédiaires " et les tiers détempteurs, ou acquéreurs qui auront acquis, " ou les créanciers qui auront prêté leurs deniers avant le " jour de la publication faite après les six mois, avaient ac- " quis leurs hypothèques sur les biens substitués, sauf aux " mineurs leurs recours contre leurs Tuteurs, pro-tuteurs ou " autres, qui par négligence condamnable aux termes du " droit n'avaient pas fait faire la publication. *Le quel usage* " *nous attestons par acte de notoriété, avoir toujours été observé*

" *dans les jugements rendus au chatelet ; de sorte que la dé-*
" *claration du 17 novembre 1690, n'a pas établi une jurispru-*
" *dence nouvelle ; mais elle a confirmé par un titre authentique,*
" *un usage qui s'y observait, qui n'était pas contraire à l'Ordon-*
" *nance de Moulins, mais expliquait l'esprit de l'Ordonnance.*"

Guyot Rep. vo. Insinuation p. 276,2 col. " Pour fixer la " jurisprudence que les cours avaient introduite sur le temps " de la publication des substitutions et de l'insinuation des " donations, qui était contraire aux articles 57 et 58 de l'or- " donnance de Moulins, il a été ordonné par une déclaration " du 17 novembre 1690, que les substitutions pourraient être " publiées et régistrées en tout temps etc."

L'on peut encore consulter les notes préparées par Auzanet et autres jurisconconsultes distingués de son temps, qui ont servi de base aux arrêtés de Lamoignon. Ces notes publiées pour la première fois en 1702, quoiqu'elles eussent été re- ceuillies longtemps avant, attestent que l'usage a toujours été de permettre l'insinuation des donations après les quatre mois.

Les arrêts qui ont établi cette jurisprudence tant à l'égard de la publication des substitutions, que pour l'insinuation des donations, sont trop nombreux pour qu'il soit possible de les citer tous. Les receuils d'arrêts de Le Prestre, de Mon- tholon, de Brillon, de Brodeau sur Louet refèrent à ceux du 8 mars 1578, du 12 mai 1581, du 7 septembre 1584, du 3 août 1585, du 21 mars 1595, du 5 août 1603, du 18 juillet 1606, du 6 avril 1610, du 22 juillet 1611, du 20 février 1618, du 21 juil- let 1640, du 20 mars 1645, du 20 juin 1665 et du 13 décemhre 1666. Nous n'en avons pas trouvé en sens contraire, si ce n'est quelques décisions de tribunaux inférieurs qui ont été infirmées par les cours souveraines.

Tous ces arrêts sont antérieurs à la déclaration de 1690. Ils nous conduisent jusqu'à l'époque de l'établissement du Conseil Supérieur à Québec. Voyons maintenant ce qui a eu lieu dans le pays. L'absence de rapports réguliers des dé- cisions de nos tribunaux jusqu'à une époque assez récente fait que l'on ne peut constater la jurisprudence que par les énonciations de ceux qui ont de temps à autre écrit des traités sur les lois du pays.

Par ordre de date, nous trouvons dans un ouvrage publié en 1773 et intitulé " The Sequel of the abstract of those parts

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of the Custom of the Prévoté and vicomté of Paris received in the Province of Quebec, in the time of the French Government, drawn by a select committee of Canadian Gentlemen well skilled in the laws of France and of that Province, by desire of the Honorable Guy Charleton, Governor General etc."

A la page 1017 que :

" Quoique pour la validité du don mutuel cet article im-
" pose l'obligation de l'insinuation dans les quatre mois, cela
" n'empêche pas que l'insinuation ne puisse être faite après
" les quatre mois expirés, mais alors le don mutuel n'a d'effet
" que du jour de l'insinuation."

Cugnet, dans son traité des anciennes lois de propriétés, publié en 1775 p. 152, art. 53, dit que le don mutuel peut toujours être insinué tant qu'il n'a pas été révoqué.

Ce traités ne parle pas de la publication des substitutions, mais nous avons vu que l'ordonnance prononce dans les mêmes termes la nullité des substitutions non publiées et des donations non insinuées dans les délais qu'elle fixe.

DesRivières-Beaubien, Lois civiles du Bas-Banada, ouvrage publié en 1832, T. 2, p. 157, dit :

" La publication et l'insinuation des substitutions doivent
" se faire dans les six mois etc...

" Les insinuations faites dans le temps prescrit ont un effet
" rétroactif au jour du décès de l'auteur de la substitution
" testamentaire etc...

" L'insinuation qui ne se fait qu'après ce temps ne rend la
" substitution valable que contre ceux qui acquièrent depuis
" du grevé les biens substitués, ou qui contracteraient avec
" lui depuis, et non contre ceux qui auraient acquis aupara-
" vant les dits biens, ou qui auraient quelqu'hypothèque sur
iceux."

Puis les commissaires chargés de préparer le Code civil ont dit dans leur cinquième rapport p. 192.

" L'insinuation au greffe a été remplacée par l'enregistre-
" ment, ce que porte l'article 194, qui établit aussi tant d'après
" nos statuts que pour le surplus *d'après notre ancien droit, le*
" *mode, les délais et le lieu de cet enregistrement, avec mention*
" *des cas où il opère avec rétroactivité......Les commissaires*
" *n'ont pas cru devoir proposer ici d'innovations aux lois exis-*
" *tantes.*"

Or l'article 194 du projet devenu l'article 941 du code décrète que : " L'enregistrement des actes portant substitution " remplace leur insinuation au greffe des tribunaux et leur " publication en justice, formalités qui sont abolies. Germain Roy & Zéphirin Pineau

" L'enregistrement se fait dans les six mois à compter de " la date de la donation entrevifs ou du décès du testateur. " L'effet et ...l'enregistrement effectué dans ces délais, opère " avec rétroactivité au temps de la donation ou à celle du " décès. Tel a lieu postérieurement et n'a d'éffet qu'à comp- " ter de sa date."

Voilà certes un concours d'autorités tel qu'ïl ne peut guère laisser de doute que l'on suivait, avant le code, relativement aux délais de la publication des substitutions et à l'insinuation des donations, les mêmes règles que celles que les or donnances expliquées par une serie de lois déclaratoires et une jurisprudence constante avaient établies en France.

La majorité de la Cour Suprême a aussi tenu dans la cause de Bulmer et al & Dufresne et al qu'une substitution, quoi qu'enregistrée après les délais de l'ordonnance, était valable. Ceux des juges qui composaient cette majorité n'ont pas encore publié leur décision, mais ils n'ont pu confirmer le jugement de cette cour, qu'en maintenant que la substitution quoique non enregistrée dans les six mois du décès de l'auteur de la substitution, n'était pas nulle à l'égard de ceux qui n'avaient contracté qu'après l'enregistrement du testament, puisqu'ils ont jugé que les Appelants Bulmer et autres n'avaient pas pu acheter du grevé ce que ,à raison de l'enregistrement de la substitution, ils savaient ou devaient savoir que le grevé n'avait pas le droit de leur vendre.

C'est appuyé de ces autorités, d'une jurisprudence qui compte des siècles d'existence et surtout du jugement de la Cour Suprême que nous reconnaissons que la substitution créée par Emilie Michaud est valable, nonobstant qu'elle n'ait été enregistrée qu'après l'expiration des six mois à compter de son décès.

Ainsi la moitié de l'immeuble acquis par l'Appelant était, lors du décès de Jean Corriveau sujette à la substitution créée par la dite Emilie Michaud en faveur de ses petits enfants qui ont été choisis par son mari. Cette même moitié était de plus sujette à un second degré de substitution créé par le testament de Corriveau, pour le cas, où ses petits enfants

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recueillant au premier degré, décèderaient en minorité et sans enfants.

Reste la seconde question. Cette substitution a-t-elle été purgée par le décret ?

Au décès de Jean Corriveau, arrivé en 1868, les cinq petits enfants qu'il avait désignés pour recueillir les immeubles laissés par Emilie Michaud vivaient et ils ont recueilli ces biens, comme appelés au premier degré à la substitution qu'elle avait créée, et comme grevés envers ceux qui étaient appelés au second degré.

Ces cinq petits enfants étaient Emilie Chalou, Jean Thomas Corriveau, enfant d'Auguste Corriveau, Joseph fils de Jean, Joseph Corriveau, fils d'Etienne, et Elizabeth Pineau, chacun d'eux ayant droit à un cinquième des immeubles délaissés par leur aïeule Emilie Michaud. Emilie Chalou est depuis décédée en minorité et sans laisser d'enfants, ni frères, ni sœurs, et sa part est par là accrue à celles des quatre autres légataires. Ceux-ci sont encore mineurs et n'ont point d'enfants, ainsi la substitution n'est point ouverte quant aux appelés du second dégré, excepté quant au cinquième échu à la dite Emilie Chalou ; il peut même y avoir quelque doute, quant à ce cinquième, mais il est inutile de s'occuper de cette question ici. Elle n'a aucune importance pour la décision de cette cause.

En 1877, Joseph Hamel, un des créanciers de la succession de feu Jean Corriveau, a poursuivi les Intimés en cette cause comme représentant sa succession et, le 23 septembre 1877, il a obtenu un jugement contre eux. C'est en vertu de ce jugement que l'immeuble dont l'Appelant s'est rendu adjudicataire a été décrété.

Les Intimés ne se sont pas pourvus contre le jugement du 23 septembre 1877 et ce jugement a obtenu force de chose jugée contr'eux. L'art. 669 C. C., conforme à ce qui était la règle dans le droit antérieur, en contient une disposition expresse. Cet article est dans les termes suivants : " L'héri-" tier (et cela s'applique également au légataire universel " art. 875 c. c.) conserve cependant, après l'expiration des " délais accordés par l'art. 664 et même de ceux donnés par " l'art. 667, la faculté de faire encore inventaire et de se " porter héritier bénéficiaire, s'il n'a pas fait d'ailleurs acte " d'héritier, ou s'il n'existe pas contre lui de jugement passé

" en force de chose jugée qui le condamne en qualité d'hé-
" ritier pur et simple."

Guyot Vo. Renonciation p. 136, dit : " Quand l'héritier affecte de ne point accepter la succession et de n'y point renoncer et qu'il est poursuivi par un créancier du défunt, le juge qui trouve la demande du créancier bien fondée, condamne l'héritier à payer comme s'il avait accepté la succession. Il est vrai que, si la condamnation n'est pas prononcée par un jugement en dernier ressort, l'héritier peut en interjeter appel, et en justifiant de la renonciation à la succession, ce jugement doit être infirmé. Lorsque le jugement qui condamne l'héritier à payer la créance a été rendu en dernier ressort, il est obligé d'exécuter cette condamnation à cause de l'autorité de la chose jugée."

Aubry et Rau T. 6, §. 612, p. 403, en interprétant l'Art. 800 du Code français, s'expriment ainsi : " Le successible qui,
" faute de s'être conformé aux prescriptions des art. 793 et
" 794, avant l'expiration des délais fixés par l'art. 796, et de
" ceux qui ont pu lui être accordés par le Juge en vertu de
" l'art. 798, a été condamné comme héritier pur et simple
" par un jugement contradictoire ou par défaut, passé en
" force de chose jugée, est aussi déchu, *à l'égard du créancier*
" *envers lequel il a été condamné, de la faculté d'accepter ulté-*
" *rieurement l'hérédité sous bénéfice d'inventaire ;* mais il con-
" serve cette faculté vis-à-vis de toutes les personnes qui n'ont
" pas été parties dans ce jugement." (Idem p. 420.)

Mais les Intimés répondent avec l'article 301 du code civil que le tuteur ne peut accepter une succession échue à des mineurs qu'après avis de parents et sous bénéfice d'inventaire.—En effet un tuteur ne peut accepter une succession pour son mineur que sous bénéfice d'inventaire, mais il peut être condamné en sa qualité de tuteur même pour une dette que son pupille ne doit pas et le jugement tout injuste qu'il puisse être, n'en acquerra pas moins force de chose jugée, s'il ne prend, dans les délais voulus, les moyens de le faire mettre de côté, soit par appel, requête civile ou autre voie de droit.—Le jugement qui condamne des mineurs comme héritiers purs et simples peut-être contraire à la loi, mais il devient chose jugée et irrévocable comme tout autre jugement. Autrefois les mineurs avaient un an de leur majorité pour se pourvoir par appel contre un jugement qui affectait

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leurs droits. (Statuts Refondus B. C., ch. 77, sect. 27 et 52) mais ils ont été privés de cet avantage par l'art. 1118 C. P. C. et ils sont maintenant obligés de se pourvoir dans les délais ordinaires. Le jugement rendu en faveur du créancier Hamel était donc exécutoire contre tous les biens des Intimés, et la renonciation des Intimés d'une date postérieure ne pouvait l'affecter.

Mais il y a plus, ce jugement a été exécuté sur les biens substitués et les Intimés ne se sont pas opposés à cette exécution.

L'effet du décret qui a eu lieu a été d'après les art. 710 et 711 du C. de P. C. de purger tous les droits affectant l'immeuble vendu, même les droits de propriété, à l'exception des emphytéoses et des substitutions non ouvertes.

Lors du décret, il n'y avait de substitution non ouverte, que celle faite pour le cas ou les Intimés appelés au premier degré décéderaient en minorité et sans enfants. Cette substitution en faveur des Appelés au second degré n'a pas été purgée, mais les Intimés qui éventuellement peuvent espérer de recueillir en vertu de cette substitution, n'ont qu'une simple espérance et aucun droit actuel. Leur action pour revendiquer la moitié indivise de l'immeuble de l'Appelant est donc mal fondée et le Jugement de la cour de première Instance doit être infirmé ; mais afin que le jugement que nous allons rendre ne puisse plus tard être invoqué contre les Appelés au second degré, dans le cas où la substitution s'ouvrirait en leur faveur, nous réservons, par le jugement même, tous les droits qu'ils pourraient invoquer en vertu de cette substitution.

Ramsay, J.—The first question that arises on this appeal is whether Jean Corriveau has exercised the faculty accorded to him by the 4th. clause of his first wife's will ?

Neither by deed of donation *entre vifs*, nor by will, did Jean Corriveau declare that he intended to exercise the power granted by his wife's will; but he did in effect dispose of all the real estate of which he died possessed to certain of the persons indicated as possible appelés by the will of his first wife. It might, perhaps, have been a question whether the general disposition of all the "*biens qui m'appartiendront ce jour*" covers any disposition of his late wife's property,

but he gives an enumeration of the immoveable property which he calls his, and it includes his wife's share of the community. Besides, there is nothing incorrect in his calling it his ; for although the legacy to Jean Corriveau was limited by the substitution of some or all of the children, he was a proprietor and not a *usufruitier*. In *Benoit* & *Marcile*, a case not unlike the present, the majority of the court held that the bequest to the husband was a usufruct, (1 Revue de Leg., p. 140), but I dont think this is the construction to be put on the will of the first wife in this case. Nor do I think it should affect the question if we were to hold it was the bequest of a *usufruit*, for the error of a *usufruitier* calling himself a proprietor is not surprising, and is easily explained. Besides the enumeration of the property, there is also a bequest by Jean Corriveau to his second wife of the usufruct during her life or *viduité*, of the half of the mill belonging to him as being part of his share of the *communauté* existing between him and his first wife, and all his moveables, over which he had complete control, indicating so far as acts can, that he had fully in view, while making his own will, the obligations imposed by the will of his first wife. I, therefore, think we should hold that Jean Corriveau exercised the faculty conferred upon him, and I think he exercised it rightly, although the will only mentions children and grand children. He was expressly allowed to stipulate charges, and great grand-children should be included in grand-children, just as grand-children are included in children. See the decisions of Papinianus, on which Pothier relies, Subst 4to. Ed. 515. See also 3 Henrys, p. 76, as to the effect of *substitution générale* by testament.

The next question, is as to the effect of the *Décret*. It was in a suit of *Hamel* & *Pineau* & *al*, and it is admitted that the suit was against the same *grevés* as those in the present action. Their subsequent renunciation to the succession of Jean Corriveau, even if it were a renunciation to the succession of their grand-mother, would not discharge them of the judgment in the suit which they had not defended, and from which there is no appeal. The principle of the right to renounce at any time until actual acceptation, by word or deed, is subordinate to the rule of *res judicata*, which creates a presumption *juris et de jure*, between the parties. Pothier

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puts this very clearly in the Cout. d'Orléans cited by appellant, p. 595, 4to. Ed.

I don't think the appelés have anything to say in the matter. I am therefore to reverse.

Jugement infirmé.

L. N. Asselin, pour l'Appelant.
John Gleason, pour l'Intimé.

QUÉBEC, 6 FÉVRIER 1883.

DORION, Juge en chef, MONK, TESSIER, CROSS et BABY, J. J.

LA COMPAGNIE D'ASSURANCE ET DE PLACEMENT DES CITOYENS,

APPELANTE ;

&

J. BTE NORMAND,

INTIMÉ.

La compagnie Appelante a effectué une assurance sur la vie de l'Intimé sous la condition qu'après avoir payé trois primes annuelles il pourrait discontinuer son assurance et être remboursé de la valeur entière des primes payées, d'après les règles du bureau. L'Intimé, après avoir payé sept primes annuelles, a discontinué son assurance et réclamé la valeur des primes payées. La compagnie a offert de lui rembourser ses primes d'après une estimation faite conformément à un règlement qu'elle avait passé depuis que l'Intimé avait discontinué son assurance.

Jugé : — Que l'Intimé n'était pas lié par ce règlement et qu'il avait droit à 33 o/o du montant des primes payées suivant les représentations qui lui avaient été faites lorsqu'il s'était assuré et contenues dans une circulaire publiée alors par l'un des agents de la compagnie, ce chiffre étant celui auquel la compagnie avait réglé avec plusieurs autres assurés.

DORION, J. C. — La compagnie Appelante a assuré la vie de l'Intimé ,le 3 novembre 1873, pour la somme de $4,000, avec participation dans les profits, à raison d'une prime annuelle de $106.80, et sous la condition inscrite au dos de la police, que lorsque l'assuré aurait payé trois primes annuelles il pourrait discontinuer son assurance, en remettant sa police, et qu'il serait remboursé de l'entière valeur des primes payées estimées suivant les règles du bureau.

L'Intimé a payé sept primes annuelles au montant de $747.60. Il a donné avis à la compagnie qu'il entendait discontinuer son assurance et lui a offert de lui remettre sa police. La compagnie n'ayant pas voulu lui rembourser une somme suffisante pour les primes payées, il a porté cette

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action par laquelle il réclame le montant des primes payées : $747.60 plus $163.52 pour sa part de profits, en tout $911.12.

La compagnie n'a pas contesté le droit de l'Intimé au remboursement d'une partie des sommes payées pour primes, et lui a offert $188, en alléguant que d'après les règles du bureau c'était là toute la somme à laquelle il avait droit.

La Cour de première instance a accordé à l'Intimé $246.70, ou trente-trois pour cent du montant des primes payées.

Le gérant et le secrétaire de la compagnie disent, dans leur témoignage, que d'après les règles de la compagnie et les calculs basés sur les tables de Ralph Price Hardy, l'Intimé n'a droit qu'à une somme de $186.90. Ils ajoutent que ces règles sont les mêmes qui sont suivies par les autres compagnies d'assurance. Mais ils n'en ont aucune connaissance personnelle, ils ne le savent que par ouï-dire et il n'y a pas d'autre preuve. Ces deux témoins admettent que la compagnie n'avait fait aucun règlement à ce sujet avant le règlement qu'elle a adopté en janvier ou février 1880. Ils n'ont pas cité un seul cas où la compagnie ait remboursé aux assurés des primes au taux fixé par ce règlement. En sorte qu'ils n'ont pas prouvé qu'avant le règlement de 1880, la compagnie avait suivi aucune règle quelconque pour déterminer le montant qu'elle devait rembourser aux assurés qui discontinuaient leurs assurances.

D'un autre côté l'Intimé a prouvé par Arthur Desfossés, l'agent de la compagnie, que lorsqu'il a assuré l'Intimé, il l'a informé que si après avoir payé trois primes annuelles il désirait discontinuer son assurance, il aurait droit au remboursement d'au moins trente-trois pour cent des primes qu'il aurait payées, et qu'il lui a communiqué une circulaire de la compagnie signée par lui-même et dont une copie a été produite pour l'engager à s'assurer. Cette circulaire indiquait les profits faits par la compagnie pendant les cinq premières années de son existence et déclarait que les assurés qui, après avoir payé trois primes annuelles, voudraient discontinuer leurs assurances, auraient droit à un remboursement d'au moins trente-trois pour cent des primes payées. Desfossés est un ancien agent de la compagnie et sa circulaire n'a jamais été désavouée. Il déclare de plus qu'à sa connaissance la compagnie a remboursé à plusieurs assurés, qui ont discon-

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tinué leurs assurances, trente-trois pour cent des primes payées.

Le témoin Boudreault déclare qu'il a réglé comme procureur d'un nommé Chainé la réclamation qu'il avait contre la compagnie et qu'elle lui a remboursé trente-trois pour cent des primes qu'il avait payées.

Cook, un autre témoin, dit également que la compagnie lui a remboursé trente-trois pour cent des primes qu'il avait payées, jusqu'au moment où il a discontinué son assurance.

La compagnie n'a pas prouvé qu'avant 1880, elle eût aucune règle fixe quant au remboursement aux assurés qui discontinuaient leurs assurances d'une proportion des primes payées et le règlement de 1880, fait après coup, ne peut servir de base pour déterminer ce que les assurés qui, comme l'Intimé, avaient payé leurs primes avant ce règlement, devaient recevoir.

De sa part l'Intimé a prouvé que pour l'engager à s'assurer on lui avait promis de lui rembourser trente-trois pour cent de ses primes s'il discontinuait son assurance et que la compagnie avait réglé sur ce pied avec plusieurs autres assurés.

Avec cette preuve la Cour de première instance ne pouvait faire autrement que de déclarer les offres de la compagnie insuffisantes et son jugement, qui a condamné l'Appelante à payer à l'Intimé $246.70, est confirmé avec dépens.

Jugement confirmé.

Turcotte & Paquin, pour l'Appelante.
J. F. V. Bureau, pour l'Intimé.

MONRÉAL, 24 MARS 1883.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 481.

JEAN DE BEAUFORT,

Défendeur en 1e. Instance,

APPELANT ;

&

J. B. E. LUREAU,

Demandeur en 1e. Instance,

INTIMÉ.

L'Appelant, agent de l'Intimé à Montréal, devait recevoir une commission de 10 pour cent sur toutes les marchandises que celui-ci lui expédierait de France. Une grande partie de ces marchandises fut vendue par l'Appelant qui ne fit aucune remise d'argent à l'Intimé, et celui-ci fit saisir-revendiquer toutes celles qui n'avaient pas encore été vendues.

Jugé : — Que sous les circonstances l'Intimé était bien fondé à réclamer les effets qu'il avait expédiés à son agent.

BABY, J.—Jean-Baptiste Ernest Lureau, propriétaire-négociant, de Saint-Lombès, Département de la Gironde, en France, était convenu avec Jean de Beaufort, agent à commission, de la cité de Montréal, de lui expédier de France des vins, huiles, spiritueux et autres produits français, sur la vente desquels l'Appelant devait retenir une commission de 10 pour cent.

En 1879, par cinq expéditions différentes, l'Intimé consigna à l'Appelant des marchandises au montant de $3,703.00, pour lesquelles ce dernier ne rendit aucun compte et ne fit aucune remise à Lureau.

Toutes ces marchandises furent vendues par de Beaufort, à l'exception de celles saisies en cette cause.

En mars 1881, Lureau fait saisir-revendiquer sur MM. Davis et Simpson, l'un courtier de douane et l'autre collecteur des Douanes, à Montréal, ce qui restait encore de ces marchandises, à savoir : 45 caisses de spiritueux, 3 fûts de vinaigre, 4 paniers de Champagne et une caisse de 25 bouteilles d'huile d'olive, et, par les conclusions de son action, demande qu'il soit remis en possession des effets, en par lui payant les droits de douanes ou autres créances légalement dues et assurées par privilège.

De Beaufort rencontra cette demande, d'abord par une défense en droit, puis par une exception péremptoire et une défense au fonds en fait, et enfin il se porta Demandeur incident, concluant à une condamnation de $2,500.00 pour dommages intérêts.

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La défense en droit fut renvoyée, et l'Appelant a si bien senti la justice de ce jugement qu'il n'y a fait aucune allusion dans son factum ou dans son argumentation devant cette Cour.

Dans son exception, de Beaufort allègue qu'il a droit de retenir entre ses mains les effets saisis comme appartenant à Lureau jusqu'à ce que lui, de Beaufort, ait été entièrement payé de ce qui lui est dû comme frais, dépens et compensation qu'il a pu encourir et qui peuvent lui être dus dans le mandat que Lureau lui a confié.

Qu'il n'a reçu de Lureau que pour $2,000 de marchandises et qu'il n'a pas fait de ventes pour son commettant pour plus de $1,500.00, sur laquelle somme il a dépensé $1,000.00 pour dépenses et déboursés autorisés par Lureau.

Que Lureau s'était engagé formellement envers lui à lui envoyer, sur demande, toutes marchandises dont il aurait besoin et, plus particulièrement, à lui tenir en mains de ces marchandises pour un montant de $7,000.00 à $10,000.00.

Qu'il aurait été stipulé entre lui et Lureau qu'il ne devait agir comme commissionnaire que pour ce dernier et qu'il pourrait vendre à terme.

Que les premières ventes avaient été faites par lui pour Lureau en août 1879.

Que même avant cette époque, Lureau avait exigé des remises sur ces ventes et longtemps avant l'expiration du terme accordé aux acheteurs et que Lureau aurait, sans aucun juste motif, cessé complétement de fournir à son commissionnaire les effets et marchandises dont celui-ci avait besoin et qu'il lui réclamait pour les fins de son commerce, et, de fait, que son commerce à lui, de Beaufort, fut ainsi complétement arrêté par la faute de Lureau et cela sans aucun juste motif.

Qu'il avait abandonné une position lucrative pour s'occuper uniquement des relations nouvelles qu'il avait formées avec Lureau.

Que Lureau lui avait ainsi causé des dommages pour audelà de $3,000.00.

Que cette somme, avec en sus $1,000.00 pour frais, déboursés et commission, formait un total de $4,000.00 qu'il a droit de réclamer de Lureau moins cependant $1500.00, montant des ventes effectuées par lui, de Beaufort.

Que les effets ainsi saisis formaient partie des envois faits par Lureau.

Concluant, tout en se réservant son recours contre Lureau pour la balance de ce qu'il lui devait, à ce que, par le jugement à intervenir, il ne fût contraint à délaisser les effets saisis qu'en par Lureau lui payant ses impenses et la compensation à laquelle il avait droit, savoir $2,500.00. Jean de Beaufort & J. B. E. Lureau

Dans sa demande incidente il repète à peu près les mêmes faits et énoncés et conclut en demandant $2,500.00.

Lureau répondit à l'exception que la seule convention entre lui et de Beaufort était que ce dernier devait vendre sa marchandise en Canada, moyennant une commission de 10 pour cent et rien de plus.

Sur la demande incidente, il ajouta que les dépenses que de Beaufort avait pu faire n'avaient jamais été autorisées par lui et que de Beaufort ne les avait faites que pour son propre avantage, afin de s'établir comme marchand à commission. D'ailleurs, que tous les frais devaient être chargés à l'acheteur comme c'est l'habitude dans le commerce, etc., etc.

La seule question qui se présente ici est de savoir si Lureau est le propriétaire de la marchandise saisie-revendiquée? Sur ce point, il ne peut pas y avoir l'ombre d'un doute, car de Beaufort en fait l'admission tant dans sa plaidoierie que dans son témoignage, et la prétention émise par lui qu'il a un gage sur cette marchandise, à raison de ses prétendus frais et impenses, est inadmissible dans le cas actuel. Lureau étant propriétaire a donc droit à ses effets. Nous n'avons pas à juger si un négociant, — après avoir expédié à son commissionnaire pour $3,703.00 de marchandises, sans avoir rien reçu, en retour, de ce même commissionnaire qui garde tout, —est en faute d'avoir cessé ses consignations et doit, en conséquence, payer des dommages-intérêts considérables à son commissionnaire, pour avoir ainsi cessé de l'enrichir à ses dépens.

Nous sommes donc d'opinion que le jugement prononcé en première instance, qui déclare les articles saisis la propriété de Lureau, est bien fondé, et nous rejetons, en conséquence, l'appel avec dépens.—Jugement confirmé.

A. Mathieu, *pour l'Appelant.*

Barnard, Monk & Creighton, *pour l'Intimé.*

MONTRÉAL, 29 MARS 1883.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 146.

J. B. J. PRÉVOST & AL.,

Défendeurs en Cour inférieure,

APPELANTS ;

&

ETIENNE LALANDE DIT LATREILLE & AL.,

Demandeurs en Cour inférieure,

INTIMÉS.

L'Appelant, opposant en première instance qui n'a pas été colloqué dans le rapport de distribution préparé en cette cause, demande la mise de côté du jugement homologuant ce rapport de distribution, parce qu'il n'a pas été notifié de la production au greffe du dit rapport par le protonotaire de la Cour Supérieure.

Jugé : — Que l'Appelant n'avait pas droit à un avis particulier, et que s'il voulait contester le rapport de distribution, il devait le faire dans les délais mentionnés à l'article 742, C. P. C.

BABY, J.—Jean-Bte Jules Prévost, Défendeur et opposant en première instance, appelle d'un jugement homologuant un rapport de distribution, vû qu'il n'a pas été colloqué.

Son appel est fondé, 1o. sur une irrégularité de procédure; 2o. sur le fait qu'il n'a pas été colloqué, tandis qu'il aurait dû l'être à l'exclusion des Intimés.

Voici les faits de la cause :

Le Dr. Boudreau, de Saint-Polycarpe, en mourant, laissa trois filles mineures : Marie-Charlotte, Marie-Corine et Ellen-Rosalie.

Le 24 janvier 1867, Prévost est nommé tuteur à ces trois enfants.

En 1874, l'aînée, Marie-Charlotte, étant devenue majeure, vendit à un nommé Moïse Leroux, moyennant une somme de cent dollars, son tiers indivis dans un certain immeuble dépendant de la succession de son père, et peu de temps après Leroux transportait ses droits à l'Intimé.

Le 18 novembre 1874, l'Intimé intenta une action en licitation, afin de mettre fin à l'indivis entre lui et les deux autres sœurs encore mineures de la cédante Marie-Charlotte, et l'Appelant fut fait partie à l'instance, en qualité de tuteur.

Celui-ci contesta l'action tant et aussi longtemps qu'il le put, mais enfin la licitation dut avoir lieu et le 11 septembre

1878, la vente s'étant faite, l'Appelant devint l'acquéreur de l'immeuble de ses pupilles pour une somme de $1105.00.

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Dans l'intervalle, la seconde fille du Dr. Boudreau, Marie-Corine, étant arrivée à son âge de majorité, avait vendu à son tour à Leroux sa part indivise dans le même immeuble.

Prévost ne paye rien sur le prix d'achat, mais se contente de produire une opposition afin de conserver sur les deniers, alléguant qu'il avait payé diverses sommes de deniers pour ses pupilles, et il concluait à ce que le prix d'acquisition fût déclaré compensé par son compte de tutelle produit et à ce qu'il fût payé de préférence à tous autres créanciers.

Plus tard, après beaucoup de litigation entre les parties, sur demande de folle enchère, il fut permis à Prévost de garder pardevers lui le montant du prix de vente, en fournissant bonne et suffisante caution, qu'il déposerait cette somme lorsque requis par le tribunal.

Le rapport de distribution fut enfin préparé et le protonotaire crut devoir ne tenir aucun compte de l'opposition de Prévost.

Après avoir défalqué les frais de collocation et privilégiés, il partagea la balance du prix de vente en trois parts : un tiers à l'Intimé comme représentant Marie-Charlotte Boudreau, un tiers à Moïse Leroux comme étant aux droits de Corine, et un tiers à Prévost en sa qualité de tuteur à la dernière fille de feu le Dr. Boudreau.

Ce rapport de distribution fut affiché pendant huit jours au greffe et, durant ce temps, aucune contestation ne fut produite de la part de Prévost et le 15 décembre 1879, 5 ans après l'institution des premiers procédés en licitation, ce rapport fut homologué par le jugement que l'Appelant désire maintenant faire mettre de côté.

Tel que nous l'avons vu, la première question qui se présente ici est de savoir si les formalités exigées par la loi ont été remplies.

L'Appelant se plaint de ce qu'un avis particulier ne lui a pas été donné de la préparation et confection, ou plutôt, de la production du rapport de distribution par le protonotaire et que l'on s'est simplement contenté de l'*affichage* de la règle.

Qu'exige notre Code de procédure en pareil cas?

Art. 742.—Par l'art. 742, " les parties ont *huit jours* pour contester le rapport de distribution à compter du jour où il a

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été affiché, si c'est un lundi, sinon le délai ne compte que du lundi suivant."

Art. 749.—Le délai expiré, le Demandeur ou toute autre partie intéressée peut demander l'homologation du rapport, s'il n'y a pas de contestation, ou de telle partie de ce rapport qui ne l'est pas, mais " cette demande, ajoute l'article, ne " peut être faite néanmoins qu'après qu'avis en a été *affiché* " au greffe au moins pendant quatre jours."

Art. 750.—" Cette homologation peut être accordée soit par " le tribunal ou le protonotaire, pendant ou hors des termes, " à moins qu'il n'y ait demande au contraire ou contestation, " auquel cas le tribunal seul peut adjuger."

Maintenant, dans le cas actuel qu'a-t-on fait ?

Le rapport de distribution a été préparé et enfilé le 1er décembre 1879, un lundi. Le dixième jour après, l'Appelant n'ayant, dans cette intervalle, produit aucune contestation à l'encontre de ce rapport, l'Intimé obtint une règle demandant que le rapport de collocation préparé par le protonotaire et par lui produit fût homologué le 18 décembre, c'est-à-dire donnant le délai de 4 jours voulus par l'art. 749 ci-dessus cité, et le 15 décembre, en effet, le rapport est homologué par le protonotaire, la non-contestation du rapport donnant à cet officier le pouvoir de le faire en vertu de l'art. 750.

L'Appelant dit que rien ne fait voir que cette demande ait été affichée. C'est vrai, mais rien n'indique non plus le contraire et en ce cas le jugement fait foi de la chose *prima facie*. Mais d'ailleurs la comparution de l'Appelant et son audition sur la motion font voir efficacement qu'il a eu ample connaissance de la demande d'homologation.

Il n'y a donc rien ici sur cette question de procédure dont l'Appelant puisse se plaindre comme lui ayant porté préjudice. Comme tous les autres plaideurs il était tenu de suivre ou faire suivre ses intérêts et, s'il ne l'a pas fait, il ne peut imputer négligence qu'à lui-même. Les articles cités, qui sont les seuls qui règlent cette procédure, ne requièrent point d'avis particulier, cette cour ne saurait donc en exiger.

En second lieu, l'Appelant devait-il être colloqué au lieu et place de l'Intimé ?

Comme nous l'avons vu, les deniers que l'on se dispute ici proviennent d'un immeuble licité entre les parties, cette licitation l'Appelant l'a combattue de toutes ses forces, si j'en

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juge par toutes les pièces de procédure au dossier, il a enfin succombé et l'immeuble a été licité aux charges contenues au cahier dûment homologué par la Cour Supérieure.

Le 11 septembre 1878, l'Appelant s'étant fait adjuger la propriété, produisit, le 21 du même mois, son opposition afin de conserver contenant les conclusions que nous avons rapportées ci-dessus.

Dans le corps de cette opposition, il dit qu'il a été poursuivi pour faire vendre par licitation l'immeuble des mineures.

Qu'en sa qualité de tuteur à ces mineures il aurait payé pour elles et à leur acquit diverses sommes au montant de mille huit cent soixante-treize piastres, ainsi qu'il appert au compte de tutelle produit.

Qu'en conséquence, il était bien fondé à demander que le montant de l'adjudication fût déclaré compensé par autant de son compte de tutelle.

Le protonotaire n'a tenu aucun compte de cette opposition et a procédé à distribuer les deniers aux trois propriétaires apparents de l'immeuble licité. Sous les circonstances, nous ne voyons pas qu'il pût en être autrement. Prévost peut avoir un réliquat de compte de tutelle en sa faveur, qu'il n'a jamais cru devoir faire valoir dans ses nombreux différends avec l'Intimé, mais il est constant qu'il faut que ce compte ait été départi et arrêté avant qu'il puisse pouvoir être offert en compensation, et quant à être une créance privilégiée sur les deniers, comment pourrait-il l'être dans le cas actuel sous notre régime hypothécaire ? question d'ailleurs que nous n'avons pas à juger ici.

Nous croyons donc que le rapport de distribution a été bien préparé et qu'il n'y a pas lieu d'infirmer le jugement qui l'homologue. L'appel est, en conséquence, renvoyé avec dépens.

Jugement confirmé.

Doutre & Joseph, *pour l'Appelant.*
Saint Pierre & Scallon, *pour les Intimés.*

MONTRÉAL, 26 MAI 1883.

Coram DORION, J. C., MONK, RAMSAY, TESSIER, CROSS, J. J.

No. 393.

ULRIC DUPUIS, - - - - *Appelant*,

&

MÉDARD DUFRESNE & AL., - *Intimés*.

JUGÉ :—Que dans l'espèce la défense de moudre du blé et autres grains excepté l'avoine, dans le moulin de l'Appelant, au profit du moulin à farine des Intimés est une servitude réelle.

TESSIER, J.—En 1865 Joseph Jarret dit Beauregard était propriétaire de deux moulins de chaque côté de la rivière du Lac Ouaro, mus par ce cours d'eau. Le moulin du côté nord était un moulin fesant farine, l'autre au sud n'était qu'un petit moulin à scie. Beauregard vendit ce petit moulin à scie avec le terrain et le pouvoir d'eau en dépendant à Jean-Bte Paquet, par acte notarié du 3 novembre 1865. Ces deux moulins étant voisins l'un de l'autre, Beauregard, pour protéger son moulin à farine, fit une stipulation expresse acceptée par le dit acquéreur Paquet :

" 1° De ne pouvoir, en aucune manière quelconque, " moudre ou faire moudre autres grains sur aucune partie " des terrains sus-désignés (tant celui vendu par Beauregard " que celui donné par Dugas), autre que de l'avoine pour " autres fins que pour en faire de la farine. "

" 2° De ne pouvoir donner ou céder, vendre ou échanger, " ou faire tout autre acte quelconque, équipolent à donation, " cession, vente ou échange des dits terrains ou aucune partie " d'iceux terrains (ce qui s'entend du terrain acquis par les " présentes ainsi que du terrain qu'il dit sieur-acquéreur a " eu du dit sieur Dugas ou d'aucune partie d'iceux), que sous " mêmes conditions expresses et spéciales, sans pouvoir non " plus se servir des dits terrains ou d'aucune partie d'iceux " ni s'en dessaisir, en tout ou en partie, pour fins qui favori- " seraient à qui que ce soit l'établissement de moulins ou " bâtisses quelconques, ou en voulant faire autre chose que " de la farine d'avoine en fait de grains, ou le permettre ou " le souffrir. "

D'après l'article 499 de notre Code civil, la servitude est "une charge imposée sur un héritage pour l'utilité d'un autre héritage." Dans l'espèce actuelle n'est-ce pas une charge imposée à l'héritage acquis par Paquet pour l'utilité de l'héritage ou moulin de Beauregard? On trouve ce qui est de l'essence d'une servitude réelle, un fonds servant en faveur d'un fonds dominant.

Ces immeubles passèrent à d'autres, mais avec la réserve de cette servitude dans tous les actes de mutation enregistrés. Les parties respectèrent cette stipulation et se soumirent à l'exécution de cette servitude jusqu'en 1877, lorsque l'Appelant Dupuis commença à commettre des infractions à cette servitude. Les Demandeurs Dufresne et autres lui firent des protêts à ce sujet, et plus tard le poursuivirent en concluant à l'enlèvement des mécanismes de son moulin propres à faire farine de blé et à leur payer $4,000 de dommages.

Le juge en Cour inférieure de première instance débouta l'action, en considérant cette stipulation comme une simple obligation personnelle. La cause fut portée en révision ; cette cour, le 31 mai 1881, renversa unanimement ce jugement en déclarant que cette stipulation était une servitude réelle, condamna le Défendeur à enlever son mécanisme à farine et à $100 de dommages et dépens.

C'est de ce jugement qu'il y a appel devant nous.

Le Défendeur avait plaidé à l'action, à part la dénégation générale, trois exceptions qui peuvent se résumer comme suit :

1. Que la convention contenue à l'acte du 3 novembre 1865, par laquelle l'acquéreur Paquet s'est obligé de ne pas moudre de grains autre que de l'avoine, et pour en faire de la farine, et le vendeur Jarret dit Beauregard de ne pas faire de farine d'avoine, ne crée pas une servitude réelle et réciproque, mais n'est rien autre chose qu'un engagement personnel dont l'inexécution ne peut donner lieu qu'aux pénalités imposées par l'acte intervenu entre les parties, ou à des dommages-intérêts.

2. Qu'en supposant que ce serait une servitude, la convention serait nulle, parce qu'elle se trouverait faite contre l'ordre public et nommément à l'encontre de l'acte seigneurial abolissant les droits de banalité.

3. Que les terrains et moulins en question étaient passés

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des mains des auteurs aux propriétaires actuels, libres des dites servitudes tant actives que passives.

Les faits ont été prouvés d'une manière très-claire, ainsi qu'ils ont été allégués dans la demande. Il ne s'agit donc que d'appliquer la loi à ces faits.

On sait qu'il n'y a plus de vraies servitudes personnelles; ces servitudes ne sont que des obligations attachées à la personne obligée, mais les servitudes réelles subsistent.

On en trouve plusieurs exemples dans notre propre jurisprudence, servitude de passage, de vue, servitude *non ædificando* de la nature de celle qui nous occupe.

On a cité des décisions qui émanent de cette cour et portent directement sur le point actuellement en litige. Dorion et Rivet, 7 L. C. R., 257; Minier et Gilmour (décision maintenue par le conseil privé), 9 L. C. R., 115; Hamilton et Wall, 24 Jurist, page 49.

On peut y ajouter une décision plus récente de cette cour, confirmée par le conseil privé *in re* Dorion et les Messieurs du Séminaire du Saint-Sulpice de Montréal, 5 Law Reports, 362 Privy Council in 1880.

Il a été cité des autorités très fortes sur ce point, tirées du Droit français, entr'autres :

Demolombe, servitudes No. 681, dit:

" Ce qu'il faut surtout considérer, c'est si la charge imposée à l'un des héritages, en même temps qu'elle le déprécie, augmente l'utilité de l'autre héritage, en tant qu'héritage d'une façon en quelque sorte intrinsèque et absolue, de manière à faire par exemple, que la maison soit habitable, ou le champ lui-même d'une culture plus facile, enfin, l'*établissement industriel lui-même d'une exploitation meilleure ou plus facile*."

Daviel, cours-d'eau, n° 607. " De même, la clause par laquelle il a été stipulé, que de deux usines établies près l'une de l'autre sur la même rivière, l'une ne pourra être convertie en moulins à grain, constitue une servitude réelle, qui affecte le fond entre les mains mêmes de tiers-acquéreurs dans le contrat desquels cette charge n'a pas été stipulée : "

Agen, 11 décembre 1861, Dalloz Périodique 1862, page 307.—Dans cette cause la cour a décidé : " La clause d'un acte de vente d'un moulin par laquelle l'acquéreur et le vendeur restent propriétaires d'un autre moulin sur une rive opposée à celle où est situé le moulin vendu, et s'obligent

respectivement à ne moudre pour aucun des habitants de l'autre rive et à ne pas vendre de farine à ces habitants, est obligatoire pour les détenteurs de ces usines : Une telle clause ne saurait être considérée comme constituant une servitude personnelle." Ulric Dussault & Médard Dufresne et al.

La Cour de Grenoble 28 mai, Dalloz Per. 1858, page 1131, a jugé dans le même sens.

Sur cette question, qui est la principale, il semble, du moins à la majorité de cette cour, très clair que dans la cause actuelle il y a la stipulation, non pas d'une obligation ou servitude personnelle, mais d'une servitude réelle assujétissant un immeuble envers l'autre, quelqu'en soit le possesseur.

Sur la seconde question, on a prétendu que l'immeuble ou moulin de Beauregard ayant été décrété par vente judiciaire, sans opposition ou mention à l'égard de cette servitude, elle se trouvait éteinte. Le contraire est évident.

Cette servitude n'a pas été purgée par le décret, et tant active que passive a suivi les immeubles entre toutes les mains des acquéreurs, postérieurs à Paquet et à Jarret dit Beauregard.

La section 27 du chap. 36 des Statuts Refondus du Bas-Canada était dans les termes suivants :

" Nulle adjudication de biens-immeubles par le Shérif ou
" adjudication dans un cas de licitation forcée, ne déchar-
" gera la propriété d'aucune servitude dont elle était sujette
" jusque là."

Et cette disposition est conservée dans l'article 709 de notre Code de procédure civile.

Notre loi est formelle : " *Le décret ne purge pas les servitudes.* "

La 3me exception à l'effet que cette servitude ne peut exister à cause de l'abolition de la tenure féodale n'est pas soutenable.

Cette stipulation a été faite en 1865, longtemps après l'extinction de la tenure seigneuriale, mais cet acte qui décréta la déchéance des droits seigneuriaux, n'a pas affecté les droits de servitude à être créés par des conventions, ou résultant du fait de l'homme.

Marcadé, qui a écrit après l'abolition de la tenure féodale en France, tome 2, p. 664, n'en dit pas moins : " Au reste les " propriétaires ont pleine liberté d'établir telle espèce de ser

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" vitudes qui leur plaît, et avec telles modifications qu'ils " jugent à propos, pourvu néanmoins que leurs dispositions " n'aient rien de contraire à l'ordre public. "

La dernière objection, c'est qu'il y a eu, dans l'acte constitutif de 1865, une clause résolutoire, c'est-à-dire que pour assurer l'exécution de cette servitude, Beauregard a stipulé que si l'acquéreur ou ses ayant-cause ou possesseurs subséquents fesaient infraction à cette prohibition de faire farine de blé, il aurait le droit de faire rescinder la vente qu'il fesait à Paquet et de reprendre le moulin vendu. Cette clause ne fait que consacrer une sanction plus forte à la servitude créée ; c'est une clause en faveur de Beauregard, qui serait plus onéreuse que la servitude même pour l'Appelant Dupuis.

Aussi l'Appelant n'a pas offert de s'y soumettre et de remettre le moulin et le terrain aux Demandeurs Intimés ; s'il l'eût fait il eût sans doute pu se libérer de la servitude en offrant d'abandonner le fonds qui y est assujéti.

A tous les points de vue le jugement rendu est correct et il est confirmé avec dépens.

Le juge Monk *dissentiens.*

Jugement confirmé

Lacoste, Globensky & Bissaillon, pour l'Appelant.
Prévost & Turgeon, pour les Intimés.

MONTREAL, 24th MARCH 1883.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, J. J.

No .358.

LA COMPAGNIE DE VILLAS DU CAP GIBRALTAR.

APPELLANTS.

&

GEORGE A. HUGHES, *Esqualité.*

RESPONDENT.

HELD (The Hon. Mr. Justrie Cross, dissenting) : That the Society Appellants, constituted under chapter 69 of the consolidated Statutes for Lower Canada, had the right, according to its own by-laws, to acquire the Real estate under the Deed of sale of the 7th october 1874, in this case mentioned, and to consent to the acte de Devis & Marché of same date.

CROSS, J. (diss).—This appeal is from a Judgment of the Superior Court rendered at Montreal on the 29th april 1881, by Mr. Justice Rainville, condemning the *Cie. de Villas* du Cap Gibraltar to pay to George A. Hughes, in his capacity of assignee to the Insolvency of the *Cie. de Prêts Hypothécaires* $3920,28, being for an Instalment and Interest accrued under an act of règlement de compte, of date the 10th September 1877, executed between the *Cie. de Villas* and the *Cie. de Prêts Hypothécaires*, before Leclère, notary.

The Règlement de compte is based upon conventions contained in notarial acts which I will presently refer to; it recites these conventions.

La Cie. de Prêts, to whom the Respondent claims to be assignee, appears to be a Building Society organized under cap. 69 Con. Stat. for Lower Canada, but whose charter was amended and extended by the Dominion Statute 40 Vic. ch. 80.

La Cie. de Villas is also a Building Society organised under he same cap. 69 of the Con. Stat. for Lower Canada with no alteration or modification of its charter.

Hughes' action is for an Instalment of the Règlement de compte, based upon a deed of sale by Charles Desmarteau

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and others to the *Cie. de Villas*, of one hundred emplacements at Cape Gibraltar on Lake Memphramagog, for which some $25,000 were to be paid; and on a Devis et Marché by which the same Charles Desmarteau and others undertook to build on the emplacements sold, 24 cottages for the *Cie. de Villas*, for which they were to pay some $24,000; and on a Transfer of these sums by Charles Desmarteau and others, to the *Cie. de Prêts*, the terms of payments by Instalments being regulated by the act of Règlement de compte already referred to.

The *Cie. de Villas* pleaded that the Stat. 40 Vic. cap. 80 was *ultra vires* of the Dominion Legislature; that the *Cie. de Prêts* had no authority to acquire such claims, nor had the *Cie. de Villas* any power to make such purchase of Real estate, or contract for the Building of cottages as mentioned in said acts; that at the time they were executed, 7th october 1874, the *Cie. de Villas* were only beginning their existence, and had nothing whatever collected or in their Treasury, and said acts operated the entire ruin of the society, whose functions were not to acquire property and build houses, to be divided among their shareholders, but only to collect small sums, and loan amounts to their shareholders as realised, respectively from time to time to enable such shareholders to purchase each for himself a house; that besides the agreement to purchase limited the number of emplacements to be acquired in proportion to the shares subscribed; that there was at no time more than 80 shares subscribed, whereof ten of the subscribers were Insolvent and 60 afterwards became Insolvent, and at no time could there have been more than ten emplacements sold according to the intention of the act, for which no more than $2,500 could have been claimed, whereas there had been paid in all to Desmarteau and others, and to the *Cie. de Prêts*, more than $15,000. The *Cie. de Villas* therefore declared that they abandoned all claim to the emplacements and cottages, and demanded the nullity of the sale of the emplacements, the Devis et Marché, the act of Transfer, and the Règlement de compte, as also the dismissal of the action.

The *Compagnie de Prêts* replied, that their quality and these nullities could not be thus invoked incidentally; that moreover the matter was *chose jugée*, the *Compagnie de*

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Prêts having already in a former suit obtained judgment against the *Compagnie de Villas* for a prior Instalment, in which Judgment the latter Compagnie had acquiesced; that the *Compagnie de Prêts* was in fact a Permanent Building Society, and as such had a right to make investments and accept personal obligations such as those they had so acquired, and that the Insolvency of the shareholders did not affect the matters in issue.

The proof is chiefly documentary and accords with the allegations of the parties; the payments on account are established.

The Respondent appears to have proved his quality of assignee. The *Cie. de Prêts* has powers granted to it by the Stat. 40 Vic. cap. 80, much analagous to those of a Permanent Building Society, supposing that Statute to be valid and not *ultra vires*, which perhaps could not be tried in this suit, nor do I think the question of *chose jugée* involved, th point does not seem to have been raised in the former suit, and therefore no prior adjudication has been had thereon. I do not deem it necessary to pass on any of these points, but confine myself to the question as to whether the *Cie. de Villas* as a Building Society not Permanent, under the cap 69 of the C. S. for L. C. had power to make the purchase, and to make and carry out the Devis et Marché with Charles Desmarteau & al above alluded to, and if these transactions were *ultra vires*, is it in their power to take advantage of their want of authority.

It seems to me clear on a simple reading of the statutory provisions governing this case, that the transactions in ques tion were wholly *ultra vires.*

Such associations are a kind of quasi corporations to which only very limited powers are given.

Cap. 69, con. Stat. for L. C., sec. 1. Provides for the formation of Building Societies by the mere deposit in the Prothonotaries' office of a declaration of intention to that effect executed by twenty persons or upwards.

§ 2 of the same section, declares that such society shall be constituted for the purpose of raising by monthly or other

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periodical subscriptions of the several members of the said Society, in shares not exceeding the value of $400 for each share, (and by subscriptions not exceeding $4 per month for each share) a stock or fund for enabling each member to receive out of the funds of the Society the amount or value of his share or shares therein, for the purpose of erecting or purchasing one or more dwelling houses or other freehold or leasehold Estate, such advance to be secured by mortgage or otherwise to the said Society, until the amount or value of his share or shares is fully paid to the said Society with the interest thereon, and with all fines or liabilities incurred in respect thereof.

The principal powers of ordinary non-permanent Building Societies are derived from this §.

Then additional powers are conferred by secs. 10, 11, 12 & 13.

By sec. 10 they are authorised to take and hold real estate or securities thereon *bona fide* mortgaged, assigned or hypothecated either to secure the payment of shares subscribed for, or to secure the payment of any loans or advances made by, or debts due to, such Society, and may invest any of its surplus funds in the stocks of any of the chartered Banks or other public securities of the Province.

By sec. 11, any such society may from time to time lend and advance to any member or other person money from and out of its surplus funds upon the security and mortgage (hypothèque) of Real Estate.

By sec. 12. Any such society may exercise such power of sale of Real Estate mortgaged to it, as may be given to it by agreement of the owner.

And by sec. 13, such society may make advances on the security of Real Estate of any member, either for its purchase, or for building thereon, or generally on the security thereof.

These provisions comprise all the authority given to such non-permanent Building Societies as regards dealing in Real Estate or making advances thereon, and obviously do not in any respect extend to the original acquisition of Real

Estate on their own account, or the contracting for the construction of Buildings thereon on their own account, or the parcelling out, or division among their shareholders by lottery or otherwise, of such Real Estate or Buildings.

The Statute contains besides, provision for the making of Rules for the government of the Society, of course in furtherence of its objects, but such Rules could not in the nature of things, extend its powers beyond the authority given by the Statute from which it derives its existence.

There is another class of associations provided for by the same Statute, viz Permanent Building Societies, which are given more extended powers, but the powers of these societies are not in question in the present controversy.

I think it is manifest from these citations, comprising the whole of the powers conferred on ordinary non-permanent Building Societies, that the *Cie. de Villas* had no authority whatever to make the extensive purchase of Real Estate which they did at the outset of their career, or to enter into the large contract they did for the Building on their own account of houses, and that such transactions were wholly *ultra vires.* It remains to be determined whether they can take advantage of their want of authority, having themselves been parties to the Acts. In this respect there is a distinction between cases where they retain none of the advantages of the transactions, and those where some at least of the advantages remain with them. In the former cases, they are allowed to plead their own incapacity. There are authorities on this subject. I will content myself with citing a single one which I feel satisfied will not be found to conflict with any one of reputed standing, and the reason of which appears to me to be convincing.

Brice, on *ultra vires*, p. 183, says :

If a contract be *ultra vires*, no matter what has been done under it, or how greatly the corporation has benefited thereby, no matter how grievous be the hardship caused by the rule, in no case can such contract be enforced against it. Probably it may have to account for any benefit received, but that is all ; the arrangement, *quâ* contract, cannot be enforced.

The same author, at page 765 :

In the case of *Pearce* vs. *Madison etc.* R. R. Co., 21 How

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441, the defendant was held not liable upon promissory notes given in payment for a steamboat, the purchase of which was determined to be *ultra vires*.

The principle of this decision has been repeatedly affirmed and probably if all the authorities upon, or connected with this point be examined, it will be found that there is not one single decision where the transaction was admittedly *ultra vires* in the true sense, and not merely unauthorised as between the corporation and its governing body or other officials and the corporators, where the corporation has been held liable thereon, even though executed. On the contrary " no sort of ratification can make good an act without the corporate authority."

The same, pp. 767, 768 :

With reference to the liability of corporations, corporations can be bound, whether by their own proceedings or those of their agents within certain limits only. Outside those limits they are not bound. Neither at law nor in equity will the other contracting party obtain any redress, in any form of suit, upon the engagement itself, from the corporation, whatever be the fraud, or however unjust the refusal of such redress. The most recent decision is that of *Re National Permanent Benefit Building Soc., ex parte Williamson*, L. R. 5 ch. 309.

P. 769. But though a corporation cannot be sued, any more than any other citizen, directly upon a contract or analogous transaction which does not bind it, yet if it sets up this defence it must restore to the other party what it has obtained from him. It may repudiate the transaction if it chooses, but if so, it must repudiate altogether—it cannot reprobate and approbate—it cannot reject and yet keep what in another form it has rejected.

And at page 781 :

If, as the effect of transactions not enforceable against a corporation directly, at the suit of a party who has been concerned therein—whether by action in his own name, or in the name of some other party—such corporation has thereby benefited, and such benefit can be traced, however indirectly, to the party complaining, then such party may

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compel the corporation to repay to him what it has so received.

See also :—*Riche* v. *Ashbury Ry., Carriage* etc. *Co.*, L. R. 7 H. L. 653 ; *Peterson* v. *Mayor, etc, of New-York*, 17 N. Y. 449, 454 ; *Fisher* v. *Tayler* 2 Hare, 218 ; *Bevan* v. *Lewis*, 1 Sim. 376 ; *ex parte Apsey*, 3 Bro. C. C, 265 ; *ex-parte Emly*, 1 Rose, 64 ; *ex parte Agace*, 2 Cox, 312 ; *Re Worcester Corn Exchange* Co., 3 De G. M. & G., 180 ; *Dickinson* v. *Valpy*, 10 B. & C., 141 ; *Hawtayne* v. *Bourne*, 7 M. & W., 595 ; *Emly* v. *Lye*, 15 East, 7 ; *Lloyd* v. *Freshfield*, 2 C. & P. 333.

It has been urged as a reason for maintaining these transsactions that they were authorised by the By laws of the *Cie. de Villas*. I do not think that this should be considered sufficient ; the By-laws are plainly *ultra vires* and could not be made to have force beyond the authority given by the law. The By-laws could not be made repugnant to the Act authorising their enactment. The learned Judge of the S. C. however thought that on the authority of these By-laws, and considering that the object for which the Society was created was for each member to obtain funds to purchase for himself one or more real properties, it was indifferent whether the member in the first instance got his title from another or from the society itself. It is obvious that it was by no means a matter of indifference, on the contrary the difference in this instance involved the ruin of the society, and the loss to the shareholders of all they paid. The Cie. entirely failed, and no one got any cottage from it ; whereas if the money had been collected it would have been on hand to advance with safety to any applying subscriber who would purchase a property for himself, not in such case encumbered by the entire price of an extensive purchase, nor for the conpact cost of twenty four cottages.

By the violation of the law as occurring in this case, it may be a question whether the Directors are liable ; we have not

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now to deal with that question, I think the Cie. is not bound, I would grant the Cie. acte of their offer to abandon all interest in the property and dismiss the action reversing therefore the Judgt. of the S. C.

We now give the judgment of the Superior Court which was confirmed in the Court of Appeals :

La Cour, etc.

Attendu que le demandeur en sa qualité de syndic à la faillite de la *Cie. de Prêts hypothécaires* de la Puissance, Dominion Mortgage Loan Co., réclame du défendeur une somme de $3920,28, cours actuel, étant pour arrérages de paiements en capital et intérêts dus et échus en vertu de l'acte de règlement et compte passé le 10 septembre 1877, devant Mtre. C. E. Leclerc, notaire, par lequel le défendeur se serait reconnu endetté envers la dite Cie. de prêts hypothécaires de la Puissance en la somme de $40,599.32, comme suit : 1o. en la somme de $25,526.19, cours actuel, en vertu d'un acte de vente à elle consenti par Charles Desmarteau et autres, le 7 octobre 1874, devant A. Archambault, notaire ; 2o. En la somme de $15,073.13, en vertu d'un acte de devis, et marché entre elle et le dit Charles Desmarteau, passé le 7 octobre 1874 devant le même notaire : lesquelles dites deux sommes auraient été transportées avec plus fort montant à la dite société de construction de la Puissance par le dit Charles Desmarteau et autres suivant acte reçu le 14 octobre 1875, devant le même notaire et dûment accepté par la dite Cie. défenderesse par acte passé le 14 décembre 1875 devant C. E. Leclerc, notaire ;

Attendu que la défenderesse plaide que le dit acte de vente du 7 octobre 1874 a été consenti, ainsi que le dit acte de devis et marché *ultra vires*, en autant que la défenderesse n'avait pas droit d'acquérir aucun immeuble ni de faire construire des maisons, vu qu'elle n'avait pas en caisse des

deniers suffisants pour payer l'acquisition des dits terrains, non plus que pour la construction des dites maisons ;

Attendu que la défenderesse plaide en outre que le demandeur n'a pas qualité pour poursuivre en autant que le parlement du Canada n'a aucun pouvoir de passer un acte concernant la dite Société de Construction de la Puissance, qu'en conséquence le dit acte est inconstitutionnel ;

Considérant que la défenderesse a été constituée sous le ch. 69 des Statuts Refondus pour le Bas-Canada ; considérant que le but de telle société et la fin pour laquelle elle a été créée étaient de procurer à chacun de ses membres le moyen de recevoir à même les fonds de la société, le montant de ses actions pour construire ou acheter un ou plusieurs immeubles ; considérant que les règlements de la dite société souscrits par les membres d'icelle lui donnent le pouvoir et le droit d'acheter les terrains y mentionnés, et d'y faire construire des maisons, lesquelles devaient être ensuite attribuées par le sort à chacun des membres ; considérant qu'il est indifférent que chaque titre fût passé séparément par le vendeur originaire à chaque membre, ou que tous les lots fussent placés au nom de la société, pour être ensuite attribués par le sort à chacun des membres, puisque la fin pour laquelle la dite société s'est formée était légalement obtenue par un mode ou l'autre et que le mode adopté par la défenderesse pour parvenir à sa fin était conforme à la loi constitutive de la dite société ; sur le second moyen :

Considérant que la dite défenderesse a transigé avec la dite Cie. de Prêts hypothécaires de la Puissance, telle que constituée par le parlement du Canada ; qu'elle ne peut pas mettre incidemment en question l'existence de la dite Cie., qu'elle n'a aucun intérêt à ce faire, que la cédante de la dite Cie. n'invoque pas tel moyen et que la dite compagnie à la faillite de laquelle le défendeur a été nommé syndic n'a agi que comme *procurator in rem suam.*

La Compagnie de Villas du Cap Gibraltar & Geo. A. Hughes.

Renvoie les exceptions plaidées par la défenderesse et condamne cette dernière à payer au demandeur la dite somme de $3920.28, cours actuel, avec intérêt sur icelle au taux de huit pour cent depuis le dit jour 14 novembre 1879, jusqu'à paiement et les dépens distraits à M. Vilbon et Lafleur, avocats substitués du Demandeur *es qualité.*

Judgment confirmed.

Bëique & McGoun, for Appelants.
J. A. Ouimet, Q. C., for Respondent

MONTREAL, 29th. MARCH, 1883.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 343.

CHARLES ROSE

Defendant in the Court below,
APPELANT.

&

ALEXANDER ROSE

Plaintiff in the Court below,
RESPONDENT.

Petitory action by respondent to recover from Appellant a piece of land which the former acquired by deed of sale from one John Rose. Appelant who denies the owners ship of John Rose was at the time of the passing of said deed of sale and has since been in possession of the property claimed in this suit.

HELD: That according to the evidence adduced the ownership of John Rose is sufficiently established, and that the Respondent is therefore entitled to the possession of said property.

CROSS, J.—Alexander Rose brought a Petitory action against Charles Rose, 26 September 1879, for the recovery of 15 acres of the west end of the east quarter of lot No. 13 in the first Range of the Township of Ely, basing his right on a Deed from John Rose of date the 28th August 1879, Registered 1st September of the same year, in which Deed it was declared that the vendor was owner from having possessed the same with a larger extent for upward of 40 years. The Plaintiff rested his claim on the Deed and John Rose's pos session alleging that since the 1st may 1877 Charles Rose had forcibly, illegally, without cause occupied said property.

Charles Rose pleaded that John Rose was not owner or possessor, that he never had any title, but trespassed on the land prior to 1867. That by Deed of date the 16th January 1867, Registered January 1867, Murdoch Rose acquired the east quarter of No. 13 1st Range Ely, comprising the land in question from Reuben M. Hart, the same being then in the occupation of said John Rose, who knowing he had no title, induced Murdoch Rose to buy it from Hart the owner. Murdoch Rose took possession and held it up to 2nd March 1874

Charles Rose & Alexander Rose

when John Rose and wife made a Donation duly registered of property to Charles Rose, the land in question was intended to be included altho not mentioned, in consequence of the tittle being in Murdoch Rose. That during 1876, Murdoch Rose verbally sold this land to Charles Rose, who had possessed it since, and had by himself and his auteurs possessed it over 30 years, and more than ten years had elapsed since the Deed from Reuben M. Hart whereby Charles Rose was in fact the owner of the piece of land.

By a second plea Murdoch Rose's title is set up with allegation that Charles Rose possessed under it,and Murdoch Rose having previously verbally agreed to sell to Charles Rose, did so by Deed of date the 11th October 1879, in which it was declared that Charles Rose had been in possession since July 1875.

Alex. Rose replied that Hart had never been owner; that on the 8th April 1809 David Ogden had purchased at Sheriff's sale lot 13 R. 1 Ely Registered 16th March 1833 and by Deed executed on the 13th April 1867, Registered 30th September 1876, Ann Anderson sold the same lot to Alex. Rose having acquired it by Judgment of Court from Ogden her first husband.

The titles recited in the pleadings were all produced, they have not much force on either side in determining the right, which not-withstanding these titles comes back to be one to be determined by possession.

The title from Hart to Murdoch Rose does not count for much, as it is not proved that Hart was proprietor, and the naked title he gave was in the face of John Rose's actual possession. Murdoch Rose conveyed to Charles Rose after the institution of this action, it looks like an after thought but would nevertheless have made a good title had Murdoch Rose been proved to be owner.

On the other hand the title from Ann Anderson to Alex. Rose is of no value, because no connexion is shewn between the title of David Ogden and that of Ann Anderson and this title if relied upon by Alex. Rose should have been set up in his declaration; his title so acquired is posterior in date and registration to that of Murdoch Rose and it does not appear that either was followed by an actual legal possession. The

Deeds on both sides may however shew that other parties were pretending to have rights in the land in question.

John Rose's possession is criticised, but we see nothing more substantial in the whole case to rely upon than this possession and followed by the Deed to Alex. Rose of date the 28th August 1879, seems to us to give more support to a title than any other of the pretensions raised in the suit. John Rose was the father of the other two, while the family lived together he must be presumed to have been the head and possessor, and altho two of his sons each in his own name acquired a colorable title, he does not appear to have been dispossessed or to have consented to a change of possession. In his old age he gave his principal property to his son Charles, but did not include the piece of land now in dispute. Altho his son Charles may have afterwards actively taken super-intendance of all his father possessed, yet it has to be presumed that the legal possession of the land in question remained with the father until he conveyed it to his other son by the Deed of the 28th August 1879, a Deed that is not impugned. True Alex. Rose's declaration states that Chs. Rose occupied this land from 1st May 1877, and it might be thereby inferred that John Rose had lost his possession from that date, but an admission of occupation is scarcely one of possession, and if it were it did not destroy the right resulting from a previous possession of over 30 years which is about as well proved as such old possession is usually capable of. Again it is a question of proof ruled by the Superior Court We see no sufficient grounds for any better conclusion than that arrived at by the Superior Court, and have consequently concluded to confirm the Judgment.

Judgment confirmed

R. & L. Laflamme, *for Appelants.*
D. Darby, *for Respondent.*

QUEBEC, 7th MAY, 1883.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, J. J.

JOHN JAMES BEW,

Defendant in the Court below.
APPELANT.

&

THOMAS SHORTREED & al.

Plaintiffs in the Court belaw
RESPONDENTS.

By an agreement entered into between the Appelant, Respondents and one Joseph Gordon, respondents undertook to advance to Gordon a sum of $7000.00 or so much more as should be necessary to manufacture and put on the track of the Northern Railway, in the Province of Ontario, a certain quantity of timber destin ed for Quebec. Respondents were to have a first lien on this timber for their advances, commission, etc. They now claim from Appellant the amount fournished to Gordon for manufacturing and bringing the timber to Quebec.

HELD: That although according to said agreement respondents undertook to advance only the amount required to put the timber upon the track of the Northen Railway, they have a legal lien for their disbursements for bringing the timber to Quebec.

CROSS, J.—In 1875, Joseph Gordon a lumber-man of the Simcoe District Ontario, had a contract with the firm of Allan Gilmour & Co. of Quebec, whereby he was to manufacture, get out and bring to Quebec for them, a quantity of from ninety to one hundred thousand feet of wainey pine timber.

It had been agreed betwen him and Bew the Appellant, that the latter was to advance him four thousand dollars to enable him to get out this timber, and a further sum of seven thousand dollars provided the Bank of Commerce would accept the drafts of himself and one Cream for that amount.

Gordon went to work on this understanding and the Appellant Bew advanced him over $3000.00, but the Bank refused to accept the drafts to continue the advances

In order to get over this difficulty and enable Gordon to proceed, an agreement was entered into on the 27th January 1876 between Gordon Bew & Shortreed & al. the now Respondents, whereby the Appellant undertook to complete his advances to the extent of $4000 and the Respendents undertook to advance Gordon on his own drafts $7000 or so much

as would put the timber on the track of the Northern Railway.

The Appellant was then to furnish money to convey the timber to Quebec. It was agreed that the Respondents were to have a first lien on the timber for their advances, commission and interest; subject to this lien, the Appellant was to have the sale of the timber and to repay himself out of the proceeds, the surplus balance, if any, was to be paid over to Dalton McCarthy.

Gordon manufactured and got out a quantity of timber somewhat in excess of his contract with Gilmour & Co. including some ash timber, a quality not specified in the contract; it was marked with the name of the Respondents and brought to Quebec as their timber, in their name.

The advances made by the Respondents largely exceeded the $7000 covenanted for. These advances were employed in manufacturing, getting out aud bringing the timber to Quebec. Gilmour & Co. only accepted a portion of it as answering the quality contracted for by them,viz some thirty five thousand feet of waney pine.

Another portion, forty thousand feet, were sold to Burstall & Co. A quantity of Ash, some eight thousand feet, was sold to the same party, and the remainder was taken by the Appellant from Indian Cove and placed in his own Cove on the St. Charles River, including one unbroken dram.

The Appellant completetd his promised advances of $4000 and after-wards furnished Gordon with $3800 to be used in paying the freight of the timber.

The advances of the Respondents made to manufacture, get out and bring the timber to Quebec, amounted to the large sum of twenty-three thousand eight hundred and eighty-one Dollars and eighty-three cents.

The Respondents brought the present action against the appellant, in which they alleged that they had made advances to the amount of $23,881 to enable Gordon to manufacture get out and bring said timber to Quebec, on which they claimed to have a lien for their advances, that they had realised from part of it, $18,000 and that including commission and interest, a balance remained due to them of $8000; that the remainder of the timber which was subject to Respondents, lien had been taken possession of to a value exceeding

John Jas. Bew & Thomas Shortreed et al.

$8000 by the Appellant, who was liable to make good to the Respondents the amount so remaining due to them as uncovered balance of their advances.

The Appellant pleaded a demurrer which was overruled and need not be further noticed. He further pleaded, denying that Respondents had made advances to the amount of $23.881, averring that the $18,000 the Respondents admitted having received, was more than sufficient to pay what was really due them, that they [had no right to have advanced more than $7000 or such further sum as was sufficient to put the timber on the line of the the Northern Railway for which advance alone their first lien was stipulated; that the portion of the timber which came into Appellants, hands was unmerchantable, being mainly culls rejected by Gilmour & Co. and Burstall & Co. and was placed in his possession by them at Respondents, request; that its value was only sufficient to pay a small portion of his advances; that the Respondents and Gordon were indebted to him in a large sum for money laid out by him for their benefit and at their request, in Quebec, and to liquidate which, he was entitled to apply the proceeds of the timber so placed in his hands.

After proof adduced by the parties on their respective pretentions, the Superior Court on the 6th of april 1882, gave the Respondents judgment for $2012.01 with interest from the date of service of process and costs, holding that the Respondents had proved their advances of $23,881,83 for the manufacture and getting out of the timber and bringing it to Quebec; that from the sales thereof they had received $18800, and a balance of $900 remained due to them on the Sale to Gilmour & Co., leaving $4161 as a balance still unpaid of their advances; that the Respondents had a first lien on the part of the timber that came into the possession of the Appellant, being of the value of $4322.93 and which he had converted to his on use; that after the timber had reached Quebec, Appellant had laid out on it $2309.82 which was to be deducted from the $4161 remaining unpaid to the Respondents, left the balance of $2012 for which judgment was given.

The Judges of this Court have gone over the proof and are of opinion that the learned Chief justice of the Snperior Court who decided the case, has taken a fair view of the

evidence. We see no reason to disturb his verification of the different accounts for advances and the facts generally as found by him.

The conclusions he arrived at on this evidence appear to be as follows. He was of opinion that the appellant was responsible to the Respondents under the agreement of the 27th january 1876 for the value of the portion of the timber that came into his possession and which was appropriated by him :—that the Respondents' conventional lien was limited to the advances made by them for manufacturing and getting out the timber and placing it on the line of the Northern Railway,but that they had a common law lien for their expenditure for freight and other necessary charges for conveying the timber, Quebec, and he made up the amount of his judgment on the principles so enunciated.

The Appellant complains that the Respondents have not shewn what part of their advances were supplied for the Manufacture and getting out of the timber, and what part went to pay freight. Admitting that this has not been made clear, yet the fact is not of importance if the claim of the Respondents in either case is to take precedence of that of the Appellant. He further complains that his advance of $3,500 lent to Gordon to be applied to the payment of freight, has not been taken into account, and is not allowed to rank on the proceds of the tim ber concurrently with Respondents, advances ; but the answer is, altho it is proved that this money was sent to Gordon, it does not appear that it was employed by him in paying freight, nor was the timber pledged to him by delivery for this advance ; on the contrary the freight was paid by the Respondents who had possession of their pledge, and thus secured a right of retention over the timber for their advances. They had by convention as well as by possession, a lien for the cost of manufacturing and getting out the timber, and a common law lien and right of retention for what they expended in freight. No right to any part of the proceeds could accrue to the Appellant until these were satisfied. Both expenditures were equally necessary, and were proved to be so. By the agreement the Respondents were to have a first lien for their advances, commisions and interest. Subject to this lien, the Appellant was to have the sale of the timber, and was to repay himself out of the proceeds. If

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Appellant's subsequent advances of $3,500 had been applied as intended in conveying the timber to market at Quebec, he would doubtless have secured the consignment of it directly to himself, and the advances of the Respondents would have been so much less; but this advance of Appellant having failed to have any effect, a necessity remained of having the timber moved, and that had to be met by the Respondents, who consequently obtained the pledge in their own hands by the possession of the timber to secure their whole advances, as well for its manufacture and getting out, as for its conveyance to Quebec. The Respondents cannot be bladmed for the loss of the money which the Appellant sent to Gordon to pay the freight; the Appellant was in fault in not seeing that it was so applied, and has subjected himself to the misfortune of having it considered an advance to Gordon without security. It has also to be borne in mind, that by the agreement the Respondents were to have the first lien, and altho they did not bind themselves to pay the freight, it became a necessity for them to do so, and the Appellant was benifitted, not injured, by their making this advance. The Appellants' money having failed to effect the purpose of moving the timber.

The Appelant makes a further point, that the Respondents' advances were not made on Gordon's drafts upon Respondents, as stipulated for, in the agreement. True, it would have been more regular as well as more satisfactory if drafts could have been produced to render precise the amounts disbursed; but seeing that the advances were actually proved to have been made and applied as contemplated this irregularity, under the circumstances, could not defeat, or even impair the Respondent's privilege. Had the advances been made by drafts, it could not have been so readily shewn that the proceeds were directly applied to the purposes for which they were intended; the money would have had to pass through other hands, in being disbursed on account of the timber. But really the only persons concerned in this are Gordon and the Respondents; the latter promised to make him advances on his drafts; they did so without the drafts the result is the same.

Again, complaint has been made of the extent of the advances, but altho a sum was mentioned, the amount was not

limited provided it was necessary. By the agreement, it was to be $7000 or so much as with the $4000 would put the timber on the Railway Track. The quantity of timber got out was larger than anticipated, it cost more than was expected, and the freight to Quebec would consequently be proportionately increased. The adventure proved an unprofitable one; hence the controversy as to who should bear the loss. Had the Appellant himself brought the timber to Quebec or thrown the charge of doing so on the Respondents by providing them with funds to do so, in place of risking his money in the hands of Gordon, the Appellant's position would have been much better, and the Respondent's advances would have been considerably less, as they would have been diminished by the whole of the cost of conveying the timber to Quebec; but we must consider the case in the light of the altered relation of the parties in consequence of the Respondents having had to bear the charges of the freight to Quebec. The Appellant by advancing the freight, might have insisted on having the control of the timber, as he was to have had the sale of it at Quebec; on taking charge of its conveyance he would have had it consigned to himself. This he failed to do and the payment of the freight by the Respondents, caused an obstacle to intervene to its being done, as the Respondents found it not only necessary to retain their hold upon the timber for security of their advances under their agreement, but also to secure payment for the additional disbursement they had been obliged to make for the freight.

Finally, the Appellant contends that all the timber has not been accounted for, and that the quantity unaccounted for was of sufficient value to cover all the deficiency of the Respondents and leave the proceeds of the timber which passed into the hands of the Appellant free to be applied to his claim, so as to deprive Respondents of all ground of action against him.

The Respondents no doubt put the quantity of timber at the highest figure in their declaration, hoping it may be supposed to prove as much as possible.

Andrew Urquhart Gordon's Book-Keeper states the quantity manufactured and got out, to have been in all about one hundred and twenty-seven thousand feet, but Gilmour's

culler rejected a good deal of it at the Railway Stations, which in consequence was not taken to Quebec. McKinlay, lumberman, measured one hundred and twenty two thousand feet at Collin's Bay near Kingston.

Altho' the Respondents charge the Appellant with fifteen thousand seven hundred and fifty-six feet of pine which the chief justice rejected as not proved, I do not yet see that the proof warrants any deficiency being charged to them, the most direct proof on the subject going rather to shew that the appellant is the party accountable for any remainder or overplus there may have been after the deliveries to Gilmour & Co. and to Burstall & Co. were fulfilled. The proof shews that the timber as a whole was taken to Quebec and put into Gilmour & Cos. Cove. Gordon says "after the timber was measured, I know that Gilmour's men took about thirtv-five thousand feet; of the remainder Messrs Burstall & Co. got about forty thousand feet of pine, and all the ash about eight thousand feet; the balance including one unbroken dram was taken away by the Appellant and placed in his own cove on the St. Charles river." I see no evidence going to contradict this statement. If he so got the balance, it should be he and not Respondents who should be held to account for any deficiency.

The Appellant produced evidence to shew that the cost of manufacturing and getting out this timber was more than the ordinary estimate for such an operation, but we cannot see how the Respondents can have their recourse limited by such a standard. The cost of most enterprises are found by experience to exceed their estimated amount, much depends on fortuitous circumstances. Adventurers are apt to be sanguine and frequently meet with unseen obstacles which augment their outlav, and increase their expenditure.

In a case where so much fact is involved, it would not be difficult to raise controversies as to the views taken on parts of the case, and even plausibly to argue in favor of different inferences regarding some of them. But on the whole we think that a very fair view has been taken as well of the facts as of the law by the Hon: the Chief justice who rendered the judgment in the Superior Court and we see no sufficient reason for disturbing it.

The judgment of the Superior Court is therefore confirmed by this court.

Quebec 7th may 1883.

Judgment confirmed.

W. & A. H. Cook, *for Apppellant.*

Irvine & Pemberton, *for Respondents.*

MONTREAL, 23rd May, 1883.

Coram Dorion, J. C., Monk, Tessier, Cross, Baby, J. J.

No. 448.

JAMES A. MATHEWSON *Appelant.*

&

LEONARD BUSH *Intimé*

&

447.

HALLIS SHOREY & al. *Appelants*

&

LEONARD BUSH. *Intimé*

Jugé : Qu'un bref de capias *ad respondendum* après jngement ne peut pas émaner dans un autre district judiciaire que celui dans lequel le jugement dans la cause originaire a été prononcé.

Dorion, C. J., *diss.*—The Respondent was arrested in the town and district of Beauharnois, on capiases issued from the Superior Court of that district, on the 19th of october 1880, on two judgments which the Appellants had respectively obtained against him in the Superior Court, in the District of Montreal, on the fifth day of June 1876.

The Court below has quashed the capiases on the ground that they were proceedings in execution of judgments rendered in the District of Montreal, and that they should have issued in that District.

There were formerly two distinct capiases, the *capias ad respondendum* and the *capias ad satisfaciendum.* The first was to compel the appearance of the debtor to answer the

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demand of his creditor, the latter, as its name indicates, was in execution of a judgment already rendered.

The capias *ad satisfaciendum* has been expressly abolished by the 12 Vict. ch. 42, sec. 1, (Lower Canada consolidated statutes, ch. 87, s. 7, § 3,) which provides that no capias *ad satisfaciendum*, or other execution against the person, shall issue or be allowed. The *capias ad respondendum* has been limited to cases where a debtor is charged with secreting his property or of leaving the province with intent to defraud his creditors.

This capias *ad respondendum* has retained its former character. It is not a process in execution of a judgment, since it is generaly issued before judgment, and the debtor who is arrested can always be released on giving security, moreover if the allegations of fraud are not proved or are disproved, the capias is quashed and the sureties released. The debtor still remaining liable for the debt.

Before the Code, there were no direct provision of law authorizing the issue of a *capias ad respondendum* after judgment had been rendered. There are, however, several cases in which the right of a judgment creditor to obtain a *capias* has been recognised, and this right has been expressly admitted by art. 802 of the Code of civil procedure. But whether the writ issues before or after judgment does not alter its character ; it remains a process to ensure the appearance of the defendant to answer the imputations made against him of secreting his property or of leaving the Province with intent to defraud his creditors, and not a process in execution of a judgment, and therefore the ground of the judgment of the court below is unfounded.

But it is contended that a *capias* is an incident to the original action and that as such it must issue from the court which has rendered the judgment. Art. 802 of the Code of civil procedure declares that a capias issued after action brought and before judgment shall be taken, as an incident in the cause, and shall be joined with the principal demand ; but the Code contains no such provision as to a capias taken after judgment has been rendered in the original cause. The law never allows two separate actions to be exercised by a creditor against his debtor for the same debt, when a full remedy can be obtained by one, and therefore a creditor is

often compelled to join several demands which he may have, at the same time, against his debtor, but when a judgment has once been rendered, the suit is at an end, and no other proceedings, unless in execution, can be considered as an incident to the original demand. J.A. Mathewson & Leonard Bush.

The fact is that a *capias ad respondendum* after judgment is an entirely new and *distinct* demand, founded on the allegations of fraud committed or discovered since the judgment was rendered. It is not the judgment which justifies the issue of a *capias*, for the judgment is only the evidence of a debt, but the fraud attributed to the defendant by the allegations on oath of the creditor or his agent, and which although disproved leave the judgment intact, while the capias is destroyed.

This new demand founded on the fraud of the debtor is subject to the same rules as all other demands and may therefore be instituted in the District where the debtor is to be found and served with the summons. (art. 34 C. C. P.)

If the *capias* could only be taken in the Court where the original judgment was rendered, a creditor who has obtained a judgment in the Circuit Court would be deprived of this remedy, for the Circuit Court has no jurisdicton in matters of capias, (art. 808 c. c. P.), and yet the Code allows a capias to issue for debts from $40 to $200 which are within the jurisdiction of the Circuit Court. The answer attempted to be made to this difficulty is that in such cases the capias will have to be issued out of the Superior Court, but in the same district where the judgment has been rendered. If so, the capias cannot be an execution of the judgment, nor an incident to the original demand, for in either case the proceeding would have to be taken in the same Court. It seems also illogical to say that a capias is an incident to a judgment and yet that it can be taken in another Court than the one in which the judgment has been rendered, provided it is issued in the same district, while it cannot be taken in the same Court in another district, even when the defendant has his domicil in such District or is served with the writ in that District. The capias is a remedial process to prevent fraud and Courts of Justice should facilitate its exercise within the limitations imposed by the Code, and as there are no provisions requiring that a capias after

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judgment should issue in the District where the judgment has been rendered, I would say that it may issue, as all writs of summons wherever the defendant may be served with the writ, and I am afraid that the restriction imposed by the judgment about to be rendered and to which I am unable to concur, will in many cases serve as a protection to fraudulent debtors and be a frequent cause of a failure of justice.

Tessier, Juge :—L'appelant Mathewson a obtenu jugement contre Bush, l'Intimé, en la Cour Supérieure, à Montréal, le 5 juin, 1876.

En octobre, 1880, l'Appelant a fait émaner un bref de *capias ad respondendum* de la Cour Supérieure dans le district de Beauharnais, rapportable et rapporté devant la même Cour, à Beauharnais, en vertu duquel le dit Intimé Bush a été appréhendé et logé dans la prison du district de Beauharnais.

La demande et les conclusions étaient comme si une autre action principale était prise dans le district de Beauharnais avec addition que le bref de capias fût déclaré bon et valide.

Le défendeur Bush contesta ce bref par une pétition sommaire devant le Juge, alléguant, entr'autres moyens, que le bref ne pouvait émaner qu'à la condition d'être rapportable et rapporté devant la Cour Supérieure à Montréal, où le jugement originaire avait été prononcé.

Le juge résidant dans le district de Beauharnais a maintenu cette pétition, et mis de côté le bref de *capias ad respondendum.* C'est de ce jugement qu'il y a appel.

La principale question, c'est donc de savoir s'il y a juridiction dans la Cour Supérieure à Beauharnais dans une semblable procédure.

Il faut consulter la loi et la jurisprudence. Cette loi se trouve dans l'article 802 de notre Code de Procédure civile, qui dit :

" Le bref d'arrestation peut être joint au bref d'ajourne-" ment, ou émaner pendant l'instance, comme un *incident* de " la cause. Il doit, dans ce dernier cas, être accompagné d'une " assignation à jour fixe pour le voir déclarer valable et " *joindre* à la demande principale.

"Le bref peut aussi émaner après jugement obtenu, pour "le recouvrement de la dette." J.A.Mathewson & Leonard Bush.

Depuis l'abolition du bref de *capias ad satisfaciendum*, on a eu plus d'exemples du recours au bref de *capias ad respondendum* après jugement. Avant cette époque, le mode de cession de biens, l'ancienne *cessio bonorum* avait son application plus utile, parce que le défendeur ne pouvait se libérer de la détention que par l'abandon fidèle de tous ses biens au profit de ses créanciers. Il est vrai que dans notre Code on a conservé la "cession de biens" comme l'un des moyens pour le débiteur de se libérer du *capias ad respondendum*, C. P. C. art. 763, 777, 793 ; mais ce moyen n'est pas obligatoire au cas de *capias ad respondendum*, ainsi qu'il a été décidé par cette Cour in re *Carter* vs. *Molson*, L. C. Jurist 26, p. 159, jugement qui a été confirmé par le Conseil Privé. Il en eût été autrement sous le régime du *capias ad satisfaciendum.* On peut donc dire que le bref de capias ad respondendum après jugement tient un peu de la voie exécutoire. C'est donc avec raison que l'article 802 semble indiquer que le capias ad respondendum, même après jugement, n'est qu'un incident de la cause originaire et que,comme les autres voies de saisie-arrêt après jugement ou autres procédures, elles doivent être jointes à l'instance principale. Cet article 802 n'est pas marqué comme de droit nouveau ; puisqu'il ne l'est pas, il faut suivre la jurisprudence sur ce point avant et depuis le Code.

Il ne peut pas y avoir une nouvelle action, "*non bis in idem*, il ne doit pas y avoir deux jugementsexécutoires, deux exécutions contestées dans deux districts, le tout revient à la cause principale 8 L.C.Jurist, p. 222 *Perry* vs. *Milne*. Maintenant quant à la jurisprudence, on ne trouve pas un seul précédent au contraire, mais on trouve une jurisprudence parfaitement établie de capias ad respondendum après jugement dans le même district avant le Code etdepuis le Code. 3 L. C. Reports, *Gale* vs. *Allan*, p. 456 ; 6 Q. L. Rep., *Drapeau* vs. *Pacaud*, p. 140 ; 8 Q. L. Rep., *Montgomerey* vs. *Lyster*, p. 375. On a pu alléguer un inconvénient, de ce qu'un bref de capias ad respondendum peut être pris après un jugement rendu en Cour de Circuit, cet inconvénient, s'il existe, ne change pas la loi, mais même en ce cas, le bref de capias sera rapportable en Cour Supérieure, mais dans le même district judiciaire où se trouve cette Cour de Circuit.

J.A. Mathewson & Leonard Bush.

De la même manière il émane un bref *de terris* de la Cour de Circuit, rapportable à la Cour Supérieure, mais toujours du même district judiciaire.

Sur l'autre point, la Requête est le bon mode de contester pourvu par l'article 819 C. P. C., il n'y a pas de délai fixé par le Code pour la produire. Ainsi décidé par 3 précédents rapportés par Foran sous l'art. 819. No. 7, 8 et 9.

Quant à l'affidavit, il est suffisant.

La majorité de cette Cour est donc d'avis de confirmer ce jugement.

Sir A. A. Dorion, J. C., & Cross, J. *dissentientes.*

N. B. Semblable jugement rendu dans une cause identique de Shorey contre Bush, No. 447.

MacLaren & Leet pour *l'Appelant.*

Archibald & McCormick, pour *l'Intimé.*

MONTREAL, 26TH. May, 1883.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, J. J.

No. 548.

THE QUEBEC BANK,

Defendants in the Court below
APPELLANTS.

&

JOHN OGILVY & AL,

Plaintiffs in the Court below
RESPONDENTS.

HELD : (*Cross, J. dissenting.*)—That the drawers and indorsers of a bill or draft on their debtor are absolutely discharged, if the draft after being accepted is not protested for non payment, on the day it becomes due, and notice be not given within three days after protest ; and that the insolvency of the drawee, when the protest should have been made, is no excuse for want of protest and notice. (Art. 2306, 2319, 2322, 2325, 2326 & 2330 C. C.)

DORION, C. J.—On the 22nd of March, 1877, the Appellants discounted a draft of the Respondents for $566,66 on Hugh M. Bunbury, of Colbourne, Ontario, their debtor, payable at the Standard Bank of Canada fifteen days after sight, and placed the amount to the credit of the Respondents.

The Appellants transmitted this draft to the Standard Bank

and it was accepted on the 23rd day of March. It was not however presented for payment on the day it became due, but only on the 18th of April, and it was returned under protest. Without the knowledge or consent of the Respondents, the date of the acceptance was altered, so as to make the draft fall due on the day it was protested. This was done by the drawee at the request of the Cashier or manager of the Standard Bank.

On the 5th of May, 1877, the Respondents paid the draft, under protest, alleging that owing to the laches of the Appellants, they were discharged from their liability as drawers and indorsers.

By this action the Respondents seek to recover the amount so paid.

The Appellants have pleaded, that they were not guilty of any laches ; that the Standard Bank were not their agents, but the agents of the Respondents ; that when the draft became due, Bunbury was insolvent and that the Respondents suffered no loss. They also alleged that the Respondents had proved their claim on this draft against Bunbury's estate and had been paid a dividend on their claim. They have, however, failed to prove that the Respondents either proved their claim on this draft against Bunbury's estate or that they were paid a dividend on it.

It is clear that the holders of the draft and the drawee could not, without the consent of the Respondents, alter the date of the acceptance, so as to postpone the day of payment, unless, as it is contended, these holders were the agents of the Respondents. If the draft had been placed with the Appellants for collection, a question might have arisen whether the Standard Bank were the agents of the Appellants or of the Respondents ; but by discounting the draft the Appellants became the owners of it, and in transmitting it to the Standard Bank they made the latter their agents for the purposes of collection.

The alteration in the date of the acceptance was not made with the consent of the Respondents or of their agents, but with the consent of the agents of the Appellants, and had the effect of discharging all prior parties. (Smith, Mercantile law, 266; 2 Daniel, Negociable Instruments, § 1377.)

This would be sufficient to ensure a confirmation of the judgment appealed from, by which the Appellants have been

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condemned to refund the amount which the Respondents have paid them on this draft.

It is claimed, however, that as the drawee was insolvent when the draft became due, according to the date of the original acceptance, the Respondents have suffered no loss and that the Appellants were not bound to have the draft protested, nor to give notice of its dishonour.

The Article 2306 of the Civil Code requires the holders of every bill of exchange to present it for payment, on the afternoon of the third day after the day it becomes due, and in default of payment such bill must be protested in the afternoon of the last day of grace (Art. 2319). In default of protest for non payment, according to the articles of this section, and of notice thereof, the parties liable on the bill other than the accepter are discharged (art. 2322). Want of protest and of notice is not excused by the loss of the bill, or by the death or *bankruptcy of the drawee* or of the party untitled to notice. (Art. 2325.)

These rules are those followed in England; and, if the last article was not so explicit on the question at issue, we would have, according to article 2340 of our code, to have recourse to the laws of England, which we find thus stated in Smith's Mercantile law, p. 239: " But the drawer and all the indorsers will be discharged, if a presentment be not made upon the very day, or if proper notice of dishonour be not given."

page 243: " the circumstance of the maker of a note having absconded from the place at which it is payable, there being no means of payment there, will not, in an action against an indorser, form an excuse for non presentment."

page 251 : " Neither will the insolvency of the accepter be sufficient to excuse the want of notice. "

Daniel, vol. 2, § 1171 : " In the second place, the bankruptcy and insolvency of the drawee of a bill, however well known, constitute no excuse for neglect to make due presentment thereof for acceptance, or to give due notice of its dishonour to the drawer and indorsers, if not accepted. And the same rule applies as to the necessity of presentment for payment to acceptor, etc. "

§1172 : " The Enghish and American cases are now uniform on this subject......... "

The same rule applies when the insolvency arises between

drawing or indorsing and maturity; and when the insolven- cy is known to the party at the very time when he signs his name, expectation or knowledge of the drawer, or indor ser, that the bill or note will not be paid are not excuses, for knowledge is not notice. An exception to this rule lies when the bill has been accepted for the accomodation of the drawer who made no provision for its payment at maturity. (Art. 2323 C. C.)

There is provision, when the drawee, at the time he accepts the bill, is the debtor of the drawer and his acceptance is an admission that he has funds in his hands to pay it with.

1 Daniel. § 16ᵃ, p. 16. § 1075, § 1076.

The same rules prevail in France under Art. 116, 117, 163 and 170, of the Code of Commerce.

Some authors, such as Pardessus, T. 2, p. 254, nº 393, p. 317, nº 435; Bedaride, Droit Com. T. 2, pp. 190, 191, and others, make a distinction when special provision has been actually made by the drawer to meet the bill and the case of a creditor drawing on his debtor.

In the first case the bearer of a bill or draft is not excused from giving notice to the drawer of the dishonour of the bill by the insolvecy of the acceptor, while, in the second case, he is. This view has been adopted by several decisions in France.

I am unable to find any such distinction in art. 163 or in any other article of the Code of Commerce. But suppose this is a correct interpretation of the french law, we have no more to do here with the French Code of Commerce, than with the Code of Prussia. We have already seen that our own Code has an express provision on this very subject and that under article 1340 of our own Code, in all unprovided cases in matters of bills of Exchange, we are bound by the law of England, and there can be no doubt, that whether we take the terms of our Code or the rules followed in England, the Respondents were entitled to notice of protest.

Bédaride, (*loc. cit.*) states that the view which he takes prevailed under the ordinance of 1673. This,however,is an error, for Pothier, a better exponent of the ordinance of 1673 than M. Bédaride can be, in his Contrat de Lettres de change, examines this very question and at nº 147, thus expresses himself.

147. " On a demandé encore, si la faillite de celui sur qui " la lettre est tirée, ayant été ouverte et étant devenue publi-

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" que avant l'échéance de la lettre, le porteur est déchargé de " la faire protester.

" La raison de douter est, que le tireur et les donneurs " d'ordre sont suffisamment avertis par la publicité de la fail- " lite, que la lettre ne sera pas payée par celui sur qui elle " est tirée, qu'en conséquence le protêt devient superflu, cet " acte n'étant établi que pour leur donner la connaissance du " refus de paiement.

" Nonobstant cette raison, Savary, *parer.* 45, décide que le " propriétaire de la lettre n'est pas dispensé, en ce cas, du " protêt, et de la dénonciation du protêt, à peine de déchéan- " ce de ses actions de garantie. La raison est, que les formes " établies par les lois pour donner à quelqu'un connaissance " de quelque fait, ne se suppléent point, et ne s'accomplissent " pas par équipollence. Par exemple, quoique la formalité de " l'insinuation des donations soit établie pour en donner " connaissance à ceux qui ont intérêt de la connaître, néan- " moins le donataire n'en est pas dispensé, même à l'égard de " ceux qu'on justifierait avoir eu connaissance de la donation. " Par la même raison, le propriétaire de la lettre n'est pas " dispensé du protêt et de la dénonciation du protêt à l'égard " du tireur et des donneurs d'ordre, quoique la publicité de " la faillite de celui sur qui la lettre est tirée, paraisse leur " avoir donné connaissance du défaut de payement de la lettre, " il n'est pas même impossible qu'ils aient ignoré la faillite, " quelque publique qu'elle ait été, d'ailleurs, en ne voyant pas " de protêt, ils on pu s'imaginer que le propriétaire de la " lettre avait eu quelque moyen de la faire acquitter. "

If we were to be guided by the French law, in this case, it would be the old French law which prevailed in this country as expounded by Pothier & Savary and not to the forced interpretation given to the Code de Commerce in direct contradiction to the terms of article 163 of that Code, which are as follows.

" Le porteur n'est dispensé de protêt faute de paiement, ni par le protêt faute d'acceptation, ni par la mort, ou *faillite* de celui sur qui la lettre de change est tirée. "

This is precisely the doctrine laid down by Pothier and the rule of the English law. How those plain words have been tortured to make them say, that in certain cases the insolvency of the acceptor dispensed the bearer from the neces-

sity of a protest and of notice of protest, is beyond my comprehension. But I again repeat it, it is not by the French Code of Commerce and the interpretation given to it by french authors and french Courts, but by our own Code and the rules of the English law. Our article 2325 which says, that; want of protest and notice is not excused by the loss of the bill, or by the death or *bankruptcy of the drawee*, is not derived from the Code de Commerce, but from the rules laid down by Pothier, Contrat de change, No. 145,6. Byles, on Bills No. 193, and Story, on Bills of Exchange, No. 326, which are the authorities cited by the commissioners who prepared the Code, as the source from which they derived this article.

There is no doubt that Bunbury, the drawee, when he accepted the bill and when the bill became due, was the debtor of the Respondents to an amount far in excess of the amount of the bill, and that therefore the Respondents had made due provision for its payement.

The Court below rightly decided that the Respondents were entitled to recover the amount they had paid on said draft and the judgment appealed from is therefore confirmed.

Cross, J. (dissenting).—On the 21st March 1877, the firm of Ogilvy & Co., of Montreal made a draft on H. M. Bunbury of Port Colborne, payable to their order at the Standard Bank of Canada, there, fifteen days after sight for $566.66. It was discounted at the Quebec Bank on the following day, and being sent for collection to the Standard Bank at Colborne, was by that Bank presented for acceptance and was accepted on the 24th of March; but having been overlooked by the Standard Bank as regards the time of payment they afterwards applied to Bunbury and got him to change the date of his acceptance to the 31st March, making it appear to fall due on the 18th of April, at which time it was protested and the regular notice given to the Drawer and Endorser.

Had the first acceptance of the 24th March remained, the bill would have fallen due the 10th of April.

The bill was returned to the Quebec Bank who insisted on payment from Ogilvy & Co; they paid under protest contending that the Bill had been accepted on the 24th of March, fell due on the 11th April, and by the Bank's negligence,

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that is by the negligence of the Standard Bank agents of the Quebec Bank, in not protesting and giving notice as of that day, they had lost recourse against them, Ogilvy & Co., the Drawers of the Bill. They consequently brought their action for the recovery back of the amount of the Bill and costs.

By their plea, the Quebec Bank denied the imputed negligence and alleged that during all the dates mentioned Bunbury had been insolvent, Ogilvy & Co. and other creditors had been trying without success to obtain payment, and if even delay or changes had occurred as mentioned, the time in no way caused any loss to Ogilvy & Co.

That a writ in insolvency issued against Bunbury 21st April, who had been previously trying te secure a compromise. Ogilvy & Co. proved their claim upon his estate and acquiesced.

The change of the date of acceptance is establisted.

It is also shewn that Bunbury's stoppage of payment resulting in his declared insolvency judicially, by the writ of the 21st April occurred previous to the 11th April. Paper had gone to protest before that date.

He himself being examined says : He began to be in difficulties about the end of March, he made the last payment about this time of $80 to Kingan & Kinloch, after which he paid nobody, having no money with which to pay any body; that the draft in question would not have been paid if presented at any time after the latter end of March, that before the issue of the writ against him he had sent a person named Goslee since deceased to Montreal to try to effect an arrangement with his creditors. Mr John Ogilvy principal partner of Respondents,firm was aware of this party's visit and its object,but says it was some time after the draft was issued, he does not deny that it was before it would fall due.

Henderson, Kingan & Kinlochs book-keeper, says they received no payment in March that the last payment they received was in February.

On the 11th of April Bunbury was notoriously insolvent. It is made clear that if the Bill had been presented at that date or at any date after the end of March it would not have been paid, and if paid the assignee under sections 133 & 134 of the Insolvent act of 1875 then in force, could have recovered back the amount paid from the party receiving it, and that by the

recovery of the amount in this suit Ogilvy & Co. make a clear gain.

This of course depends on the question whether Ogilvy & Co. as Drawers of the Bill are discharged from their liability by the laches of the Standard Bank acting as agents for the Quebec Bank.

The Bill might have been kept in circulation for any reasonable time before presentation without impairing recourse against the drawers ; or if retained by the Drawee in his own hands when presented for acceptance, he might have lawfully changed the date of acceptance before delivery to the holder. See Ross, on Bills, p. 480.Dalloz, Dict. de Jur. vo Effets de Com. no 280. But having accepted the Bill as of the 24th of March,the rights of the Drawers could not be afterwards affected by a change of the date of acceptance,arranged between the Drawee and the holder. The holder is undoubtedly liable for the exercise of diligence as of an acceptance on the 24th of March. We have therefore to enquire if Ogilvy& Co.can claim to be discharged by the failure of the Standard Bank to do diligence on the Bill as of the 11th April.

The nearest precedent we have had cited to us is the case of Knapp & al *vs* the Bank of Montreal. In that case determined 23rd April 1849 and in appeal 12th July 1850 the S. C., held that the want of funds in the hands of the Drawee was a sufficent excuse for the endorsers as well as the drawer. Judge Rolland dissented but it does not appear on what grounds. The endorsers appealed and the Judgment as regards them was reversed.

In rendering Judgment Chief Justice Stuart remarked there is no question what law should govern the case ; it must be the law of France such as it existed at the time of the establishment of the Superior Council in this Country, subject to such additions and modifications as custom may have introduced.

Absence of effects according to the law of France could only affect the Drawers. In this case it is *chose jugée* as against the Drawers, there should have been protest and notice in due time as respects the endorsers, the question of provision is only material as to drawers.

The French Ordinance of Commerce of 1673 was excluded or not admitted to be law in this case,

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It is unnecessary to follow it further than is reasonable and especially in regard to the penalties it denounces.

Pothier has been cited to justify the déchéance of recourse against the Drawers as well as the endorsers.

Pothier, Du Contrat de Change p. 544, cap. V. Sec. 2 Art. 1,§6, No. 156.

" La peine du propriétaire de la lettre de change, lorsque " lui ou le porteur son mandataire a manqué d'en faire le " protêt dans le temps réglé par la loi, ou lorsqu'après l'avoir " fait, il a manqué d'agir en garantie contre le tireur et les " endosseurs dans le temps fixé par l'ordonnance, est de por- " ter lui-même l'insolvabilité de la personne sur qui la lettre " est tirée, et en conséquence d'être déchu de l'action qu'il a " contre le tireur et les endosseurs pour la répétition de la " somme qu'il a donnée pour la lettre de change. Ordce de " 1673, Tit. 5, Sec, 15. "

Both Pothier and Savary wrote under the French Ord. of Com. 1673, their commmentary on that ordinance is inappli- cable here.

The English authorities are generally to the effect that bankruptcy does not excuse the holder from giving notice of dishonour, and if we had to be guided by the English rule perhaps it would be found strict enough to discharge the drawer in the present case. They seem to require notice of dishonour to be given in all cases where the drawer or endor- sers as the case may be had an interest in receiving it.

Art. 2340, C.C., enacts that in all matters relating to Bills of exchange not provided for in the Code recourse must be had to the laws of England in force on the 30th May 1849.

Before resorting to these laws let us first see what are the provisions of our own Civil Code. Art. 2322 provides that the parties other than the acceptor are discharged for want of protest and notice, subject to the exceptions in the two follo- wing articles which are 2323 : If the Drawer proves that pro- vision was duly made by him for the payment of the Bill, and 2324 when rendered impossible by inevitable accident or irresistable force.

There are thus two exceptions the one in question in this case being the want of provision. It is true that art. 2325 not being one of the exceptions says that want of protest and notice is not excused by the Bankruptcy of the Drawee, which not

being an exception as regards the Drawer is meant to apply to holding the endorsers not the drawer.

The want of provision being the exception here relied on, it is necessary to enquire what is meant by want of provison·

The Ordce. of 1673 used the terms " seront tenus de prou- " ver que ceux sur qui elles étaient tirées leurs étaient rede- " vable ou avaient provision au temps qu'elles ont dù être " protestées."

The Code de Commerce art. 116 is alike explicit.

The English authorities are equally explicit that a debt düe by the drawee to the Drawer is provision they go further even to the extent of saying, if the drawer had reasonable ground for drawing, and altho our own code does not define, what is provision, it will doubtless be conceded that such a debt due by the Drawee is provision.

But altho the law of England admits of the holder excusing himself as against the drawer for failure to give timely notice of dishonor, by the want of assets or funds in the hands of the drawee, on that being shewn by him the holder, it lays down no such emphatic rule as is contained in our code or in the ordce. of 1673 or in the Code de Commerce. That the Drawer to exempt himself from liability must prove provision in the hands of the Drawee, thus throwing upon the Drawer the onus of shewing that at the time the Bill became due, *à l'échéance*, he had effective provision in the hands of the Drawee. Has he then effective provision if the Drawee has become a Bankrupt. It is quite true that he by his laches assumes the risk of what may be called ordinary insolvency difficulty of recovering or otherwise but if there is an absolute *faillite* at the time the Bill falls due, the Drawee is *désaisi* of his estate in contemplation of law, and a Protest and notice can be of no value whatever to a drawer whose funds in the hands of the drawee were at his the drawer's ristk until by diligence they could be drawn from the hands of his debtor, and if shewn that by no possibility could the utmost diligence have made any difference it would be unreasonable to award the drawer a gain of the amount of his Bill which was worthless and ineffectual, and a loss of it to the holder merely by the observance of an ineffectual formality. In such case the provision that had at one time existed in favor of the drawer had become destroyed and

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annihilated by the failure of the Drawee his debtor before his funds could be withdrawn.

It is thus I understand the authority in Pardessus. 2 Pardessus No. 393, p. 252.

" Quelque promesse que le tiré ait fait d'accepter, eût-il " même donné son acceptation qui le rend véritable et direct " débiteur de la lettre, il n'en résulterait pas en faveur du ti- " reur une preuve qu'il eût provision. L'acceptation ne la " suppose que dans le sens indiqué ci-dessus ; mais toute sup- " position devant cesser lorsqu'il en résulterait une injustice, " le tireur qui n'aurait rien fourni commettrait un vol puis- " qu'il aurait reçu le prix d'une chose qui n'aurait pas existé " ou qui ne serait jamais fournie, il est donc justement tenu " de prouver l'existence réelle de la provision. 2 Pardessus, " No. 393, p. 252.

" Le seul fait que le tiré était débiteur au moment de l'éché- " ance de la lettre serait insuffisant si à cette même époque ce " tiré était en faillite ; car un failli étant désaisi de l'adminis- " tration de ses biens ne peut payer personne, ce n'est plus " lui qui doit, c'est la masse qui ne payera qu'au fur et me- " sure des recouvrements. 2 Pardessus, No. 393, p. 254.

2 Dic. de Dalloz, Vo. Effets de Commerce, p. 238, No. 196, " non seulement le tireur est tenu de prouver que la provi- " sion avait été faite entre les mains du tiré accepteur ou " non, il doit encore démontrer que cette provision existait " *intacte* a l'époque de l'échéance, que la somme était dispo- " nible qu'aucun empêchement n'était survenu à ce que le " tiré la comptait intégralement au tiers porteur.

No. 197 " C'est ainsi qu'il a été jugé que la faillite de l'ac- " cepteur ou du tiré arrivée avant l'échéance de la traite, dé- " truisait la provision entre ses mains et que le porteur con- " servait son recours contre le tireur malgré la tardivité du " protêt.

198 " Il importerait peu que la faillite n'eùt été prononcée " que postérieurement à l'échéance de la lettre de change si " du reste l'ouverture est fixée avant cette échéance. "

Given more at length in Dalloz, Jurisprudence Générale, 6 vol. p. 564, col. 2, no. 40.

Such has been the holding under a law in similar terms to our own Code and from which our Code seems to have been copied.

If contended that the English practice may be different, cases should be shewn where the precise question has come up there, but if even it be so, the provisions of our own Code as far as they go must exclude the English rule. Quebec Bank & J. Ogilvy et al.

The whole law on the subject of Bills of exchange in England has recently been embodied in a Statute 45 & 46 Vic. C. 61, statutes of 1882. It contains no such provision as that in the art. 2323 of our Code, that the Drawer cannot avail himself of the want of protest or notice unless he proves that provision was duly made by him for the payment of tbe Bill. To have the English Statute or law apply, it would be necessary first to insert in it the terms of the article in question from our own Code.

I think the fair result would be in giving effect to the sense of that Art. to hold the drawer responsible.

In this sense the Judgment in this case would be reversed.

The contrary conclusion is the one arrived at by the Court I do not deny that it has certain advantages in rendering more uniform and perhaps practically more certain the practice here and in England, but I don't think it is equitable.

Judgment confirmed.

(The Hon. Mr Justice Cross, *dissentiens.*)

Davidson & Cross, *for Appellants.*
Kerr, Carter & McGibbon, *for Respondents.*

MONTREAL, 27th JANUARY 1883.

Coram DORION, C. J., RAMSAY, TESSIER, BABY, J. J.

No. 398

THOMAS GRANGE,

Defendant in the Court below,
APPELLANT.

&

DUNCAN McLENNAN,

Plaintiff in the Court below,
RESPONDENT.

On 7th december 1874, Appellant made a promise of sale to Respondent, then a minor, of a farm for $1200, of which $500 were paid at the time, balance payable in seven yearly instalments of $100 each with interest at 7 0/0; Respondent to have immediate possession, to ratify the deed on becoming of age, and to be entitled to a deed of sale, if instalments were paid as they became due, if not, to hold only as tenant. After Respondent became of age he left the country without ratifying the promise of sale; he paid none of the instalments which became due, and in 1879 Appellant regained possession of the farm. In October 1880, Respondent returned and tendered the balance of the price, and claimed the farm.

HELD: Confirming the judgment of the Court below (Dorion, C. J., dissenting) that Appellant was bound to give a deed and deliver the farm to Respondent. (1)

DORION, C. J., (diss.)—This action is to compel the Appellant to grant to the Respondent a deed of sale of a farm situated in the parish of St. Théodore, in compliance to a promise of sale made before Legris, a notary public, on the 7th of December 1874.

The Appellant pleaded that the Respondent had not fulfilled the conditions of the promise of sale which had thereby become inoperative. The superior Court has, however, maintained the action, and condemned the Appellant to give to the Respondent a deed of sale in due form and to deliver over to him the property claimed.

The appeal is from this judgment.

The circumstances which have given rise to the suit are as follows:

By a deed passed before Legris, a notary public, on the

(1) This judgment has been reveised by the Supreme Court in June 1883.

7th of December 1874, the Appellant has promised to sell the farm in question in this cause to the Respondent, then a minor, but assisted by Roderick McLennan, his father, who promised to have the transaction ratified by his son, when his son should have attained the full age of twenty-one years. This promise of sale was made for the sum of $1200, of which $500 were paid, at the time, and as to the balance of $700, the Respondent promised to pay it to the Appellant in seven yearly consecutive payments of $100 each, the first of which would fall due on the 1st. day of October 1875, with interest at the rate of seven per cent per annum, to reckon from the first day of October 1874.

The deed contains the following provision, which has given rise to the present litigation :

" It is especially covenanted and agreed upon between the said parties hereto, that if the said Duncan McLennan makes regularly the said payments of one hundred dollars said currency, when they will fall due respectively, together with the interest, till the full payment of said sum of seven hundred dollars, then and in that case the said Thomas Grange will be bound, as he doth hereby bind himself to give the said Duncan McLennan a free and clear deed of sale of said farm ; but on the contrary, if said Duncan McLennan fails, neglects or refuses to make the said payments when they come due, then the said Duncan McLennan will forfeit all right he has by these presents, to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all monies already paid and which might hereafter be paid, which said monies will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties hereto will be considered as Lessor and Lessee."

At the date of this promise of sale, Roderick McLennan was living on the farm with the Respondent and the other members of his family. The Respondent became of age in the month of January 1875, and continued to live on the farm with his father for about a year after he had become of age. He then left for the United States where he still resides. He has not come to Lower Canada, since he has left, except once on a visit of three or four days in the fall of 1880 (See

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Roderick McLennan's deposition, appendix to Respondent's factum, p. 7.)

The Respondent never ratified the promise of sale, as he was bound to do, on his coming of age, and neither he nor his father Roderick McLennan have paid to the Appellant any portion of the principal and interest accrued on the balance of $700, due on the price stipulated in the said promise of sale. The Appellant has mereover been obliged to pay the municipal and school taxes and the seigneurial charges due on said property.

After waiting for several years without receiving either principal or interest, the Appellant sought to get back the possession of his property, and on the 6th day of May 1879, Roderick McLennan, who was still in possession of it, and who, it seems, had furnished the $500 which had been paid to the Appellant, when the promise of sale was passed, consented to resiliate the same and to give up to the Appellant possession of the farm, on condition that he should be allowed to occupy the house till the 1st of November following (1879). A deed was passed to that effect.

Subsequently, Roderick McLennan refused to give up the possession of the house, and the Appellant obtained a judgment of ouster, and finally recovered the possession of the house also.

It was not till the 23rd. of October, 1880, and after the Appellant had been in possession of the farm for nearly eighteen months, and of the house for about a year, that a tender was made to him in the name of the Respondent of the sum of $997.31, as the balance in principal and interest of the price stipulated in the promise of sale of the 7th of December, 1874.

This tender was made through a notary and was accompanied by a demand on the Appellant to grant to the Respondent a deed of sale in the terms of the promise of sale.

The Appellant having refused to comply with this request, the Respondent has brought this action whereby he renews his tender and claims that the Appellant be ordered to give him a regular deed of sale of the property in question, and to deliver him the possession of the same.

Upon the return of the action, the Appellant, by a dilatory exception, demanded security for costs and a power of attorney from the Respondent, as residing in the United States

This demand was complied with and then the Appellant filed a plea to the merits, setting forth that the Respondent had not ratified the deed of the 7th of December, 1874, on his becoming of age, as required by the said deed, and that he had failed to make any of the payments therein mentioned, and that he had thereby forfeited any right to claim a deed of sale; that Roderick McLennan who had promised to have the said promise of sale ratified by the Respondent, had, by deed of the 6th of May, 1879, annulled and cancelled the said deed of sale, and that the Appellant had been compelled to pay $39.80 for municipal and school taxes and seigneurial dues accrued on said farm, and also $40 for necessary repairs, and $45.70 for legal expenses; and finally that the tender of the Respondent was incomplete and insufficient.

To this plea, the respondent answered that he was never asked to pay the balance of the price; that the forfeiture could not be claimed until all the instalments had become due and he had failed to pay them and the interest thereon; that he had always been ready since he had become of age to ratify the promise of sale, but was never asked to do so; that he never authorised the cancellation of the promise of sale by Roderick McLennan which was obtained by fraud; *that, as to the taxes and seigneurial dues, he was never informed that Appellant paid the same and that in any case such taxes and dues should have been paid by Roderick McLennan who was in the occupation of the farm until evicted by the Appellant, and who would have paid him;*—that the proceedings in ejectment against Roderick McLennan could in no way affect him, the respondent, as he was not a party to the suit, and he could not be liable for any costs incurred, and that such proceedings were only part of the same fraudulent designs of the Appellant to deprive the Respondent of the property by indirect and fraudulent means; that when the tender was made to Appellant, he fully admitted his obligation to convey the farm to the Respondent and promisedto do so, only demanding the reimbursement of certain taxes and dues, which Respondent, although not bound to pay, yet offered to do so, in order to remove all difficulties and to leave no pretext to the Appellant for witholding the conveyance of the farm.

After the issue had been joined and the parties had proceeded to their *enquête*, the Respondent made an additional

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tender of $31,60 for taxes and seigneurial dues paid by the Appellant and at the same time offered to pay the $40 alleged to have been laid out in repairs, if the Court should so award.

Several incidental points have been raised in this case, but the only really important question in issue is as to the effect of the stipulation contained in the promise of sale that if the Respondent failed, neglected or refused to make the several yearly payments of $100 and interest when they became due, he should forfeit his right to obtain a deed of sale, and forfeit the monies he had paid, which should be considered as rent of the farm, the promise of sale should be considered as null and void, and the parties considered as lessor and lessee.

The Respondent contends that this promise of sale, having been accompanied by tradition and actual possession, was under art. 1478, C. C., equivalent to a sale, which could only be dissolved by a judgment at the instance of the Appellant. The Appellant on the other hand claims that the promise is to be governed by the conditions attached to it, and that the failure of the Respondent to ratify the promise of sale when he became of age and to pay the instalments on the balance of the price, as they became due, operated in the terms of the deed as a forfeiture of the rights of the Respondent to acquire the property in question.

Art. 1478 C. C. applies to an ordinary and unconditional promise of sale. Here the parties have attached to their transaction a perfectly legitimate condition, the object of which was to enable the Appellant to recover back the possession of his property by the simple process, as between lessor and lessee, without having recourse to the expensive proceedings of a sheriff's sale or to that of an action *en résolution de vente* in default of payment of the price of sale. The parties have in effect declared that until the Respondent should pay the $700 remaining on the stipulated price of sale, he should be the tenant of the Appellant and the $500 paid should be taken in payment of the rent, and that if the balance of $700 and interest was regularly paid as the several instalments became due, the Respondent should then be entitled to claim a deed of sale of the property leased. Art. 1478 C. C. does not apply to such a contract, as it was well

decided by the Court of Review in the case of Noël and Laverdière and The British American Land Co., opposants. (4 Quebec Law Rep. 247). If we consider the deed of the 7th of December, 1874, not as a lease with a right to the lessee to purchase, but as a promise of sale followed by possession, it cannot be denied that the promise was made subject to the condition on the part of the Respondent of paying the balance of the price by instalments, and that in default of paying any of the instalments when they should have been made, defeated any right the Respondent could otherwise have claimed, and this without the necessity of any demand to annul the deed. Thomas Grange & Duncan McLennan

Even before the Code, when all such clauses were considered as comminatory and required a judgment to discharge the promissor, Pothier, in his treaty *de la vente*, No. 480, 4th paragraph, says : " Quoique je n'aie pas obtenu de sentence, " s'il s'est passé un temps considérable, il en peut résulter une " présomption que les parties se sont désistées tacitement de " cette convention. "

Troplong, vente, No. 132, commenting on Art. 1589, of the french Code, says :

" Puisque la promesse de vendre est équipollente à la " vente, il faut dire qu'elle est susceptible des mêmes condi- " tions suspensives et résolutoires que la vente. Il est même " assez ordinaire qu'elle soit conditionnelle " and at No. 134 the author adds : " Si celui à qui la promesse a été faite ne " se présente pas à l'époque indiquée pour passer contrat, il " faut distinguer s'il y a un terme indiqué ou bien si la con- " vention ne porte pas de délai.

" Dans le premier cas, la convention est résolue de plein " droit et le promettant est dégagé.

" Dans le second cas il faut suivre la marche que nous " avons tracée au No. 117."

In the present case the Appellant was only bound to sell and to give a contract of sale to the Respondent, in case the latter should ratify the promise of sale on his attaining the age of twenty one years and should pay the balance of the price of sale at the periods fixed by the contract. He has neither ratified the contract nor paid the instalments on the price as they became due and therefore the Appellant was *ipso facto*

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discharged from the obligation to give him a title deed. It is unnecessary to discuss the pretention of the Respondent that his right to obtain a deed of sale could only be forfeited after he had failed to make all the payments mentioned in the promise of sale ; there is no pretext whatsoever to sustain such a pretention ; the stipulation is plain and applies to the failure to pay any one of the instalments mentioned in the deed.

Laurent, vol. 24, No. 25, speaking of a conditional promise of sale, says :

" La promesse de vente peut-elle être faite sous condition ? " L'affirmative n'est pas douteuse : tout contrat peut être " conditionnel ; l'art. 1854 le dit de la vente, et la promesse " bilatérale vaut vente. Il faut en dire autant de la pro- " messe unilatérale, elle forme aussi un contrat ; donc elle " peut être faite sous condition. On applique, dans ce cas, " les principes qui régissent la condition.

....

....

" La promesse de vendre se trouve souvent ajoutée à un " bail comme promesse de vendre sans que le preneur pro- " mette d'acheter ; la promesse peut aussi être bilatérale, " soit pure et simple, soit sous condition."

....

" Si la promesse de vente était bilatérale, et pure et simple, " quoiqu'ajournée à la fin du bail, par exemple, il y aurait " vente et translation de propriété. Partant, l'indemnité (due " pour expropriation) appartiendrait à l'acheteur. Mais que " faut-il décider si la promesse est conditionnelle ? La vente " conditionnelle ne transfère pas la propriété, tandis que la " vente à terme la transfère. Tout dépendra donc de l'inter- " prétation du contrat. Est-il conditionnel, l'indemnité sera " due au vendeur, et l'acheteur ne peut la réclamer parce " qu'il n'y a pas encore de vente."

This is a good test, and it cannot be seriously contended that in case of expropriation the Respondent could have claimed the indemnity if he had not yet paid the price to the Appellant.

The Court below considered the deed of the 7th of December, 1874, as a real sale subject to a revocatory condition in case of non payment by the Respondent of the pur-

chase money, instead of a mere promise of sale depending on the payment of the price by instalments as a condition precedent or *condition suspensive*, (Art. 1079, 1081, 1082, 1087) which, not having been fulfilled within the delay fixed by the parties, annulled *de plano* the promise of the Appellant to execute a deed of sale. **Thomas Grange & Duncan McLennan**

The Respondent has all along treated the stipulation as a revocatory clause, and the authorities which he cites are all applicable to the resolution in default of payment of the price of a complete sale, without noticing that here the sale was only to take place if the Respondent paid the balance of the purchase money within certain specified terms.

The difference is clearly explained by the writers. Art. 1079 C. C., 2 Pothier, oblig. No. 224.

Aubry and Rau, vol. 4 § 302, p. 75, sec. B., say: "La "condition suspensive venant à défaillir, l'obligation et le "droit qui y est corrélatif sont, *ipso facto*, à considérer comme "n'ayant jamais existé. Ainsi, par exemple, l'acquéreur, "qui aurait été mis en possession de la chose par lui acquise "sous condition serait obligé de la restituer avec tous ses "accessoires et avec les fruits qu'elle a produits."

Larombière, vol. 2. page 2, nos. 1, 2 et seq., page 118, nos. 1, 2 and 3 on Art. 1176 and 1177 of the french Code, and p. 120, no. 6, Art. 1549 C. C.

The Respondent has invoked in support of his pretensions the answer which Gladu, the notary, has inserted in his protest as given by the Appellant to the tender made to him on behalf of the Respondent; but the Appellant having refused to sign the pretended answer, it cannot be invoked against him. The Art. 1209 C. C. has an express provision to that effect and on this point I beleive the Court is unanimous. The notary's declaration cannot give authenticity to such an answer; it is clear that it cannot be proved by witnesses, as the Respondent has attempted to do, for such evidence would be a clear violation of art. 1233 of the Civil Code;—even if such evidence was admissible, it is clear from what transpired on the occasion referred to, that no new agreement was entered into between the parties and neither the tender nor the action are predicated on any such new agreement.

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The deed of the 7th of december, 1874, merely conveys to the Respondent the right to occupy the farm in question, as the tenant of the Appellant, coupled with a promise of sale on the part of the Appellant, should the Respondent pay regularly within the time specified the several instalments of $100 each and interest, to complete the stipulated price of $1200; and the Respondent having failed to pay any of the said instalments, his right to claim a deed of sale has lapsed, and in the view I take of this case it is quite immaterial whether the lease or license of occupation precedes or follows in the deed the promise of sale. It is said, however that there could be no lease, as there was no rent fixed. This is not correct, for Art. 1608 specially provides that persons holding real property by sufferance of the owner, without lease, are held to be lessees, and bound to pay the annual value of the property. This shows that there can be a lease without any agreement as to the amount of the rent, which in such case is to be determined by the annual value of the property leased. It is not necessary to decide here whether the five hundred dollars paid by the Respondent are altogether lost to him or if, as is more likely, they are forfeited only to the extent, as it seems to have been intended, of the annual value of the property during the time the Appellant was deprived of it; the action not being to recover any portion of these $500, but to recover the property itself.

Even if the condition as to the payment of the price could be considered as a revocatory condition, it could not avail the Respondent to compel the Appellant to grant him a deed of sale, for, according to the authority of Pothier, No. 480, already cited, it was not necessary under the circumstances of this case that the Appellant should have obtained a judgment discharging him of his obligation. This author says that, if a long time has elapsed, a presumption may result that the parties have tacitly desisted from their stipulation. In the present case the Respondent has been nearly five years without ratifying the promise of sale as he was bound to do, to avail himself of its conditions; he, almost immediately after becoming of age, left the country without any intention to return and has since resided abroad; he never fulfilled any of his obligations and has paid none of the six instalments

that became due before the institution of the present action, nor any part of the interest accrued thereon; he did not even pay the ordinary municipal and school taxes and the seigneurial dues which were payable on the property. The only party whom he left in possession of the farm was his father, who, from all the circumstances, seems to have been the party really interested in this promise of sale, since the $500 paid appear to have been provided for by him and he is the party who, having promised to have the deed ratified by his son and who being left in possession of the farm, has consented to the resiliation of this promise of sale and has delivered the property over to the Appellant. If there is any case in which a party may be presumed to have desisted from a lease and promise of sale, without requiring an adjudication to that effect, from a Court of justice, it is certainly in a case like the present, when the party has withdrawn permanently from the jurisdiction of the Courts which he now invokes and, by his own conduct, has rendered it almost impossible, except at a great sacrifice, to obtain that order of cancellation which he alleges was necessary to deprive him of his pretended right to claim the property from the Appellant, notwithstanding his own laches. If his claim is valid now, why should it not still be valid after twenty-nine years absence, when the property might have doubled or trebled in value and when the Appellant, to protect it, would have been compelled to disburse large sums of money, or might have parted with it in good faith? The equitable rule laid down by Pothier seems to have a special application to the circumstances of the present case.

The Respondent may possibly claim that in leaving the country, he has not abandoned the possession of the property, but left it in charge of his father. In that case the father would have been his constituted agent and the abandonment which he made to the Appellant would, under the circumstances, be considered as an act of good administration and to avoid costs and be binding on the Respondent.

It is not, however, on these grounds that I base my dissent from the judgment about to be rendered. It is on the broader ground that the condition precedent on which the promise of sale was made was not accomplished by the Respondent within the specified delay, and the Appellant has thereby

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been released from this obligation entered into to sell the property to the Respondent in case he should fulfil his obligations. I would therefore reverse the judgment of the Court below, and dismiss the action of the Respondent.

RAMSAY, J.—On the 7th December, 1874, the Appellant entered into a deed with Respondent, then a minor, but assisted by his father, one Roderick McLennan, by which he promised to sell to the Respondent a certain farm for $1,200, on account of which he acknowledged to have received $500, and the balance was to be paid in sums of $100 and interest at seven per cent., the first of these instalments to fall due on the 1st of October 1875, and the interest to be calculated from the 1st October 1874.

The presence of the father at the passing of the deed was that he might undertake "to have his said son ratify these presents when he will come to the full age of one and twenty years."

The deed then went on: "It is especially covenanted and agreed, etc." (See clause printed above):

Duncan McLennan came of age in 1875, but never got possession of the farm under the provisions of this deed, but Roderick McLennan did, and remained in possession of the house at all events till June, 1880.

On the 6th May, 1879, the Appellant and Roderick McLennan made a deed by which they cancelled the deed of promise of sale, and agreed that the $500 should be for the rent of the premises up to that time. The Appellant then brought a suit to evict Roderick.

After the eviction of Roderick McLennan the Respondent protested the Appellant and demanded a deed for the farm tendering him $997.31 as for the capital of $700 and interest, and offering to supplement the same if need be.

The Appellant agreed, it is alleged, to accept this offer if the seigneurial dues and taxes were paid, but without stating the amount. The Respondent then wrote to the Appellant, desiring to know the amount so due, but the Appellant failed to declare the amount, and in effect did not make it known till the 10th March 1881, at *enquête*.

Duncan McLennan then sued the Appellant, repeating his tender, and demanding a deed, and to be put in possession of the farm.

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The Appellant met this action by five propositions: 1st. The instalments were not paid when due, and therefore the original deed became only a lease. 2nd. There was no ratification when the Respondent came of age. 3rd. The deed was cancelled according to the terms by Roderick, who as *préte-fort* had a right to cancel. 4th. That Respondent had no interest in the farm. And 5th, that the tender was insufficient.

The first and third of these propositions alone appear to me to merit consideration. The ratification of the deed was in the interest of the Appellant, and he had a right to require it of Respondent so soon as he was of age, but not before. This is all the deed says. The Appellant having contracted with Duncan has no right to raise the question of Duncan's interest in the way he has done. He may perhaps have some rights against Roderick, and through him against Respondent; but Roderick was not put *en cause*, and the matter, if any, is not pleaded. If Respondent be right as to the first question, the tender appears to me to be sufficient for the reasons given in the judgment of the Court below.

If the third proposition be correct, and be applicable to a case like the present, it will be unnecessary to consider the effect of this curious deed. There can be very little question, I think, that the general principle invoked by the Appellant is true. If A warrants (*se porte fort*) that B will do a thing, A binds himself to its performance; and this is equally true whether B at the time be *incapable*, or A acts without authority from B. Nor can it be doubted, I think, that so long as the *choses sont entières*, A can discharge himself of his obligation by cancelling the deed. When, however, it appears that the *incapable* has paid or done something in execution of the contract, I can hardly understand how any act of the warrantor or of the other party can set aside the deed *without reserving his rights.*

Of course, if the protest and answer are proved, it would strengthen Respondent's case; for it would be an acquiescence in Respondent's pretensions. But speaking for myself, I do not think the answer is proved. It is not signed (Article

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1209 C. C.), and I do not think any verbal evidence could be received under our law to establish a title to a property of this value.

Allusion was made to the case of *Munro* & *Dufresne*. This case is not in point. In *Munro* & *Dufresne* there was a mere promise of the refusal of certain property up to a certain day, that day having passed the obligation was at an end. I am not aware that an option of that sort, where nothing passed, was held to be of a nature to require a *mise en demeure*. It would be seriously inconvenient if it did.

I am therefore of opinion that there was no cancellation of the deed, and that Duncan McLennan's ratification was *en temps utile*. This seems to me to be the whole question, for the fact of Duncan McLennan being out of the country could not possibly destroy his rights. If he had a right to be put *en demeure*, this must be done, and a deed with an unauthorised person, as Roderick McLennan was, could not affect this right one way or the other. I am to confirm, and this is the opinion of the majority of the Court.

Judgment confirmed.

Doutre & *Joseph*, for the Appellant.
Davidson & *Cross*, for the Respondent.

MONTREAL, 29th MAY 1883.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, J. J.

No. 226

GRAHAM,

Defendant in the Court below,

APPELLANT;

&

McLEISH,

Plaintiff in the Court below,

RESPONDENT.

HELD.—That in an action of damages for malicious libel, the truth of the matter charged as libel may be alleged in defence as a circumstance in mitigation of damages when the intention to injure is negatived by the plea. (Dorion, C. J., and Baby, J., *dissentientibus.*)

CROSS, J.—McLeish brought an action of damages against the publisher of the *Star* newspaper for libel, in which it was alleged that the libellous matter was false and malicious and was published with the intention to injure and ruin the Plaintiff.

The Defendant pleaded that he had only given the substance of a common rumour, besides, what he had stated was in fact true, that it had been stated without any malice or intention to injure, but as information which the public had an interest in being informed of, and he as a journalist communicated to them in the public interest, that if not entirely excusable, yet he had a right to plead the truth, at least in mitigation of damages.

The Plaintiff demurred, objecting to that part of the plea which contended for the right to prove the truth of the libellous matter.

The Superior Court sustained the demurrer in terms rejecting so much of the plea as alleged and claimed the right to prove the truth of the libellous statements.

Thus there was no specific part of the plea rejected, no particular paragraph struck out, but only a principle laid down without any specific application to any particular part of the document impugned.

This is an unscientific and illogical form of pleading, con-

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sequently the judgment thereon can only amount to a general direction to be followed by the Judge who is to try the case, to observe certain principles in the admission or exclusion of evidence; no specific part of the plea being rejected, it is therefore impossible to determine from the judgment what particular part of it is to stand.

As regards the objection to the allegation of the truth of the libellous matter, the question came squarely up in this Court in the case of Gugy vs Ferguson reported 11 L. C. R., p. 409, where the defamation consisted of the imputation "You are a perjured scoundrel" and the Court sustained the plea of its truth alleged in mitigation of damages. It does not appear by the report with what, or if with any palliation of circumstances the matter was pleaded; it may therefore be assumed to have been a less favorable case than the present; at all events the Court sustained the plea and the principle. Another case has since been determined at Quebec in the same sense: Langelier vs. Brousseau, 5 Quebec Law Reports, p. 198, S. C. 1880, and I have always understood that the impression at Montreal was, that truth could be pleaded in mitigation of damages in libel cases.

It is true that in almost every french authority, we find it stated that truth does not justify a libel, an axiom in which I entirely concur; but I see nothing in any of them to prevent the truth being alleged as a palliation or mitigation of damages, as the result may in fact prove it to be. In certain circumstances it may prove exactly the reverse. I presume it will scarcely be disputed, that a Defendant may help to prove a Plaintiff's case, the plea may succeed in bringing out the animus by which the libel was inspired. In such case the plea of truth might prove an aggravation, although the Defendant might have intended the reverse.

The Plaintiff has full scope to allege the libel with all the attendant circumstances of malice and intention to injure. Why should the Defendant not have the like opportunity to explain the circumstances in which he was placed, and the motives which prompted his action? If in regard to these his mouth has to be closed, he is to a certain extent placed at the mercy of his antagonist.

I do not see how justice can be so well accomplished in

such cases as by a narration and proof, by each of the parties, of the circumstances, leaving the tribunal to judge of the good or bad faith of the litigants, thus affording the best criterion for the measure of damages, if any have been sustained.

I will content myself by citing one or two authorities to illustrate my meaning. Take, for instance, Merlin, in his Rep. de Jur., Vo. Injure, § 3. He begins by remarking: "On ne doit point regarder comme injure, ce qui a été dit ou fait *sans aucun dessein d'injurier.*" He then gives several examples of slander which from the circumstances he considers perfectly excusable. First the Sieur Duval whose sister-in-law living in the house with him, had a sum of money stolen from her. He took two witnesses and searched the house, the money was found in the *paillasse* of the bed of his two female-servants. One of them asked who could have put it there? He replied. It must have been you, and observing one weep, he said to her: It must have been you. They left his service and prosecuted him, obtaining his condemnation to a fine, but in the Cour de cassation the judgment against him was set aside. The next, La Dame Deüster prosecuted by the Sieur Weiss for spreading the report that he and his family had the itch. She excused herself by saying she had told her friends so as to avoid contamination. She was fined; but the Cour de cassation annulled the judgment against her. Next, the mayor of Merxheim called a Calvanistic Clergyman an ass, he was condemned, but the judgment had the same fate as the others in the Cour de cassation.

The next was that of a Bailiff who had served a judgment for le Sieur Brunenghé whom he asked for his fees and in return was accused of having committed an irregularity and forgery in his procedure. It appears that without the Sieur Brunenghé's consent this Bailiff had been substituted in the place of another who was to have made the service. There were circumstances of suspicion as to the regularity of the Bailiff's proceedings, the consequence was that the condemnation he obtained had no better fate than the others in the Cour de cassation.

In these cases the circumstances must have been all pleaded and proved, otherwise the Court could not have been informed of them.

Merlin then goes on to state "Une question que les auteurs

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ont fort agitée, de savoir si la vérité de l'injure doit excuser celui qui l'a proférée.

Mais quelque vraie que soit l'injure, lorsqu'elle est faite *dans le dessein d'injurier*, elle est punissable quand même elle ferait connaître un crime dont il conviendrait de tirer vengeance pour l'intérêt public."

I will supplement this by a citation from les Arrêts de Brillon, Vo. Injure, t. 2, p. 442.

L'injure *etiam* de chose vraye est défendue quand elle se dit *conviliis causa et injurianda animo si non convitiis*, L. *de injur.*, parce que l'honnêteté publique et la civile conversation en est offensée, qui ne permet pas que l'on s'injurie l'un l'autre.

It follows, I think, that when the Defendant denies the in tention to injure, and states the circumstances, the allegation of the truth cannot be excluded from these circumstances, nor can a plea be rejected on demurrer, because it contains such an averment, with circumstances of excuse or justification. It is a graver question how far and in what manner proof may be admitted of this truth. The tendency of modern ideas is to admit this proof, although it may be not as an entire justification. It is now admitted in criminal cases where the truth is alleged, and it is further alleged, that it was for the public benefit that the matters charged should be published and the particular fact or facts stated, whereby it was for the public benefit, when if properly pleaded, it becomes a question for the Jury to determine on the proof.

Experience demonstrates that there may be malicious truth. Moral actions are only to be estimated by their motives, and truth spoken with an injurious purpose partakes of the nature and engages in the guilt of falsehood, but truth may be honestly spoken with a view to warn the public against the injurious example of bad actions and promote a moral sense by which public opinion is moved to the suppression of vice. The Defendant as journalist naturally publishes events which are of general interest; he has no title to be a public censor, but if he confines himself to an honest statement of facts in regard to events which for general advantage it is well should be known, he may believe that he can take the risk of submitting to a Court or Jury as to whether his

acts have been blamable or otherwise. He may be willing to take this risk.

The majority of the Court are of opinion that the demurrer in this case was improperly sustained; that, in place of being maintained it should have been overruled. We therefore reverse the judgment of the Superior Court and dismiss the demurrer.

DORION, C. J.—The Appellant who in 1879 was the publisher of a newspaper called "The Star" has published on the 18th of March, 1879, an article headed "A MONSTER'S WORK.—A YOUNG GIRL ENTICED INTO A RAILWAY OFFICE, DRUGGED AND OUTRAGED. NED. MCLEISH TRUE TO HIS RECORD. AN OUTRAGED FATHER FAILS IN AN ATTEMPT TO PISTOL THE FELLOW," in which he accuses the respondent, by name, of having committed almost every conceivable crime.

For this libel the respondent has sued the Appellant for $10,000 damages.

The Appellant has answered this demand by alleging that the statements contained in the article were true and that he was ready to prove them.

To this plea the respondent has demurred and the Court below has maintained the demurrer and rejected the plea.

From this judgment the Appellant has instituted the present appeal.

The whole question before us is, whether, the Appellant has the right to prove the truth of the libel which he has published against the Respondent.

This question must undoubtedly be determined by the rules of the french law and it would be difficult to find a single french authority to support the doctrine that the author of a libel can justify the libel by proving the truth of the injurious statements which he has published. The contrary doctrine has universally been held; the only exceptions being when the libel is justified by the occasion, on which it is published and which makes it a privileged communication, or when the facts imputed to the party against whom the libel has been published have become notorious, such as would be a condemnation by a Court of justice for a criminal offence.

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Denizard, Vo. Injure, No. 15, says on this subject.

"Ceux contre lesquels la réparation d'une injure est de-
"mandée, ne sont pas reçus à prouver la vérité des paroles
"injurieuses : les admettre à faire cette preuve, ce serait au-
"toriser la diffamation. L'ordre public veut qu'on proscrive
"ces sortes de preuves, qui loin de justifier aggraveraient
"l'injure. On peut sur cela consulter *Boerius*, *Covaruvias*,
"*Despeysses*, *Chenu & Charondas.*"

The following passage in Guyot's Répertoire, Vo. Injure, p. 237 1st col., is to the same effect : "Mais quelque vraie que "soit l'injure, lorsqu'elle est faite ailleurs qu'en justice, dans "le dessein d'injurier, elle est punissable, *quand. même* "*elle ferait connaître un crime* dont il conviendrait de tirer "vengeance pour l'intérêt public."

Dareau, in his traité des Injures, ch. 1. Sect. 1, No. 5, and Merlin in his Répertoire, Vo. Injure, § 3, No. 3, both hold the same doctrine.

Nothing can be more applicable to the present case than these autorities, which have become the basis of our jurisprudence as regards actions for libel and for slander.

In the case of *Nickless* and *Brown*, the defendant sued in damages for having stated, 1st that the plaintiff had set fire to his own house, and 2ly that he had been convicted for embezzlement, pleaded the truth of his accusations, and, on demurrer, his plea was rejected as to the first imputation and maintained as to the second, on the ground that a conviction and sentence for a crime was a notorious fact.

This case is taken from the note book p. 581, of the late Chief Justice Reid, who rendered the judgment on the 15th of October, 1822. A case of *McKay* and *St-Germain* is there cited as having been decided in the same sense.

In the case of *Bélanger* and *Papineau*, 6 L. C. Reports 415, this Court decided in 1855, that it was not necessary that the Plaintiff should prove that the imputations against him were false, to enable him to recover damages.

In the case of *Noël* and *Chabot*, 8 L. C. Rep. 211 the plea alleging the truth of the imputations on the character of the plaintiff was dismissed, on demurrer, by Chief Justice Meredith.

The case of *Pétrin* and *Larochelle*, 4 R. L. 286, also support the pretentions of the Respondent.

In *Brossard* and *Moquin* the defendant had publicly stated that the plaintiff had committed perjury. On being sued for damages he pleaded the truth of his statements. This plea was dismissed, on demurrer, and the judgment confirmed, in appeal, on the 17th of June 1875.

On the 5th of June, 1879, this Court unanimously reversed the judgment of the Superior Court in a case of Hart, Appellant, and Thérien, respondent, and condemned the respondent to pay $20 damages, for having unnecessarily stated in an action for professional services, that those services had been rendered to the Appellant for a venerial disease. The truth of the statement was not denied, but on the contrary, it had been admitted by the Appellant, who had confessed judgment on the action in which it was made.

The case of *Gugy* & *Fergusson*, 11 L. C. Rep. 409, was cited in support of the pretentions of the Appellant, but the only question decided in that case was that a party could plead that the occasion on which he was accused of slandering the respondent was a privileged one, without admitting having used the expressions complained of, and in that case both Chief Justice La Fontaine and Judge Duval differed from the majority of the Court.

It is contended on behalf of the Appellant, that although the truth of the libel cannot be proved as a justification, yet it can be proved in mitigation of damages. I am unable to understand how the proof of the truth of a libel can diminish the damages such a libel may have caused, and there is no authority to be found in the french books to authorise such a distinction.

Then it is said that the Respondent having in his declaration alleged that the facts stated in the libel were untrue, therefore the Appellant ought to be admitted to prove that they are true. The Respondent was entitled to prove malice by showing that the Appellant knew that his statements were untrue, and if the Respondent adduced any evidence to that effect, then, and not until then the Appellant would have a right to rebut such evidence by proving the truth of the statement made. We have shown, however, that the respondent in order

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to recover damages, is not bound to prove that the facts stated were untrue, and therefore the Appellant who is the defendant has no right to prove that they are true unless the plaintiff had first entered into this evidence.

For these reasons, I am unable to concur in the judgment about to be rendered, and by which the judgment of the Court below will be reversed and the appellant allowed to enter into the proof of the truth of the facts by him stated in the impugned article.

Judgment reversed.

Robertson & Fleet, for Appellant.
Pagnuelo & Saint-Jean, for Respondent.

MONTREAL, 27th MAY 1883.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, J. J.

No. 430

BONDIER ET AL,
Plaintiffs in 1st Instance,
APPELLANTS;

&

DÉPATIE,
Defendant in 1st Instance,
RESPONDENT.

HELD.—That the proprietor of a trade mark registered under the Trade Mark Act. 42 Vic., ch. 22, has a right to claim damages, under section 17 of said act, against a person selling goods bearing an imitation of the same, even when there is no intent to defraud or deceive. (Dorion, C. J., and Cross, J., *dissentientibus.*)

CROSS, J., *diss.*—The Appellants are manufacturers of tobacco pipes, at Paris, in France, and as a trade mark use the letters G. B. D., inscribed on the bowl of each pipe.

On the 8th September 1879, they caused this mark to be registered at Ottawa, under the Trade Mark Act of 1879, Dominion Statute, 42 Vic., cap. 22.

The Respondent carries on a small business in tobacco and tobacco pipes, on St. Catherine street, in one of the suburbs of the City of Montreal.

In August 1880, the Appellants sued the Respondent for $1000 damages for infringement of, and having in his possession and selling, pipes marked with a false imitation of their trade mark G. B. D., claiming at the same time an injunction to restrain any further of such sales.

The Respondent pleaded that he did not put in question Appellants' right to the trade mark, that he was in no manner guilty of having in his possession pipes bearing said trade mark, that he acquired such pipes regularly in the ordinary course of his business, and as soon as he heard of the registration of the trade mark in question, he ceased to offer such pipes for sale.

The Superior Court gave the Appellants judgment for $25 damages. The Court of Review reversed this and dismissed the Appellants' action; they have appealed.

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It is proved by a witness named Campeau, whom the Appellants sent round to detect infringements of their trade mark that about the 16th August 1880, he bought a pipe from the Respondent at his shop in the suburb, marked G. B. D., for which he paid thirty cents, and which he believed was a conterfeit of the genuine G. B. D. pipes, as well in regard to the quality as the mark.

The Respondent proved that he had bought the pipes, such as he sold to Campeau, from a dealer in the City named Goldstein; that they were a common article of traffic in the City, and that a mark would not make five cents difference in the price of a pipe. It did not appear that the Appellants had published the fact of the registration of their trade mark, and up to the time of the institution by them of a number of actions including the present for infringement of the mark, such registration was not known by dealers or others.

On this state of the case and of the proof, an injunction having become unnecessary from the Appellants' right being acquiesced in, the only question that came up for adjudication was whether the Respondent was responsible for any, and if for any, for what damages.

The remedies for infringement are contained in sections 16 and 17 of the Trade Mark Act, 42 Vic., c. 22.

Sec. 16 gives a remedy by criminal prosecution for misdemeanor, against any persons knowingly infringing the rights of the proprietor who has his trade mark registered, when the violation is with intent to deceive.

By sec. 17 A suit may be maintained by any proprietor of a trade mark, against any person using his registered trade mark, or any fraudulent imitation thereof, or selling articles bearing such trade mark, or any such imitation thereof, or contained in packages, being or purposing to be contrary to the provisions of this Act.

Taken in connexion with the preceding section, the infringement contemplated by this section would seem to mean, a wilful infringement; but in the absence of any intent to defraud or deceive, it is doubtful whether an action could be maintained, and if it could, it would certainly not be for more than actual damage.

In such a case, there can be no right to vindictive or exem-

plary damages, there having been no purpose or intention to do wrong, and the proprietor's remedy at most, would be limited to the actual loss he suffered by the unconscious act of the transgressor, which in the present case would be limited to his loss of profit on the sale of one pipe, and perhaps not that, as the purchase was not *boná fide* for consumption. I think the judgment of the Court of Review was just and correct and should be sustained.

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Dorion, J. C.— Les appelants, fabricants de pipes en France, réclament de l'intimé $1000 de dommages pour avoir vendu, à Montréal, des pipes portant une contrefaçon de leur marque de commerce enregistrée conformément à la loi, le 8 septembre 1879, et qui consiste dans les lettres G. B. D.

L'Intimé a répondu qu'il avait acheté ces pipes sur le marché de Montréal ; qu'il ignorait qu'elles fussent une contrefaçon des pipes fabriquées par les Appelants et qu'aussitôt qu'il en a été informé, il a cessé d'en vendre.

Il a été prouvé que l'Intimé avait, le 16 août 1880, vendu une pipe portant la marque des Appelants, mais qui ne sortait pas de leur fabrique ; que cette pipe avait été vendue trente centins et que les pipes portant cette marque et venant de la fabrique des Appelants valaient, celles de première qualité $31.00 la douzaine, celles de seconde, quarante pour cent de moins et qu'il y en avait qui se vendaient même pour $7.00 à $8.00 la douzaine.

Il a aussi été prouvé que des pipes semblables à celles vendues par l'Intimé se vendaient par tous les marchands de pipes, à Montréal, depuis plusieurs années, et les Appelants n'ont pas prouvé que l'Intimé sût que ces pipes fussent une contrefaçon des leurs. Sur cette preuve la Cour de première instance a condamné l'Intimé à payer $25 de dommages.

La Cour de Révision a infirmé ce jugement et renvoyé l'action des Appelants.

La clause 16 de l'acte 42 Vict. ch. 22, déclare que toute personne autre que celle qui a fait enregistrer une marque de commerce, commettra un délit et sera passible d'une amende de pas moins de $20 et pas plus de $100, si elle appose cette marque de commerce ou si elle vend ou met en

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vente *sciemment* un objet quelconque portant la dite marque de commerce, avec l'intention de tromper et de faire croire que cet objet a été fabriqué par le propriétaire de telle marque de commerce.

La clause 17 est en ces termes :—" Le propriétaire d'une " marque pourra instituer une poursuite contre ceux qui " auront fait usage de sa marque enrégistrée ou de toute " imitation frauduleuse de sa marque, ou qui auront vendu " des objets portant une telle marque ou une telle imitation, " ou renfermés dans des emballages qui seront ou représente- " ront ses enveloppes particulières, contrairement aux dispo- " sitions du présent acte."

La note en marge de cette clause porte les mots, " Actions " en dommages par le propriétaire."

Cette clause 17 a donc été insérée pour donner au propriétaire de la marque de commerce un recours en dommages contre ceux qui, sans droit et *contrairement aux dispositions de l'acte*, vendraient ou offriraient en vente des objets portant une marque de commerce appartenant à ce propriétaire, en outre de l'amende mentionnée dans la clause seizième.

Or, quels sont ceux qui vendent ou offrent en vente des objets contrairement aux dispositions du statut ? Ce sont ceux qui, sciemment, vendent ou offrent en vente des objets portant une marque contrefaite. Ce sont les personnes mentionnées dans la section 16, il n'en est pas question d'autres dans le statut et ces mots ne peuvent s'appliquer qu'à celles-là. En référant à l'acte 23 Vict, ch. 27, d'où sont tirées les clause 16 et 17, cette interprétation est rendue encore plus évidente, car ce statut ne contient que quatre clauses, et les dommages ne peuvent se rapporter à d'autres qu'à ceux qui sciemment enfreignent les dispositions de ce statut, savoir ceux qui sont mentionnés dans la clause précédente.

Sabastian, Law of trade-marks, p. 95, dit : " According " to the strict principles of the common law, for an action " in respect of trade-marks, to be successful, it must be " proved that the defendant acted with fraudulent intention. " *Proof of fraud on the part of the defendant, says Lord West-* " *bury C.* " *is of the essence of the action.* (Édelston vs. Edelston, 9 Jurist N. S. 479.) Le sommaire de la décision dans cette cause est comme suit ;

" If A has acquired property in a trade-mark, which is after-
" wards adopted and used by B, in ignorance of A's right, A
" is entitled to an injunction, but not to an account of profits
" or in compensation, except in respect of any user by B after
" he became aware of the prior ownership."

Dans la cause de *Upmann* vs. *Elkan*, 7 L. R. ch. 130, la Cour a accordé une injonction, mais sans frais, parce que le défendeur avait reçu de bonne foi les articles portant une marque contrefaite et qu'il n'y avait pas de fraude de sa part.

Notre statut sur les contrefaçons est basé sur les principes que l'on suit en Angleterre, et la jurisprudence anglaise doit ici nous servir de guide.

Je ne puis concourir daus le jugement qui va être rendu et qui condamne l'Intimé à payer des dommages et les frais de trois cours pour avoir vendu une pipe valant trente cents, sans savoir qu'elle portait la marque de commerce des Appelants. Il est à remarquer que, s'il avait frauduleusement apposé lui-même cette marque de commerce dans l'intention de tromper, l'Intimé pouvait n'être condamné qu'à vingt piastres d'amende, minimum de la peine que la loi impose et que pour avoir vendu une seule pipe, sans aucune intention de fraude, il a été condamné par la Cour de première instance à $25 de dommages. Cela me paraît être un excès de rigueur, surtout si l'on considère les frais énormes qu'entraîne cette condamnation. J'aurais renvoyé l'action des Appelants,parce qu'ils n'ont pas prouvé de fraude de la part de l'Appelant et qu'ils n'ont pas non plus prouvé de dommages, mais sans concourir dans tous les motifs donnés par la Cour de Révision.

Monk, J., remarked, that as the trade mark had been registered, Respondent could very easily ascertain that it was Appellants' trade mark. It made no difference whether Respondent was in good or bad faith, the law applied to every one. The fact of selling the pipes was not denied, and he ought to have known it was a fraudulent imitation.

The opinion of Judge Rainville who rendered judgment in first Instance should be maintained, and the judgment in Review reversed.

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Suivent les jugements prononcés par la Cour Supérieure, le 28 février, 1881 ; par la Cour de Révision, le 30 septembre, 1881, et par la Cour d'Appel.

Jugement de la Cour Supérieure :

PRÉSENT : L'hon. M. le juge Rainville :

La Cour, etc.

Considérant qu'il est prouvé que les demandeurs ont fait enregistrer leur marque de commerce le huit septembre, 1879;

Considérant qu'il est établi que le défendeur a vendu des articles portant une imitation frauduleuse de la dite marque de commerce, et qu'à raison de ce les demandeurs ont souffert des dommages, que la Cour fixe à vingt-cinq piastres, attendu la bonne foi du défendeur, condamne en conséquence le dit défendeur à payer aux dits demandeurs la dite somme de vingt-cinq piastres et les dépens comme dans une action au-dessus de cent piastres distraits à Messrs Duhamel, Pagnuelo, & Rainville, avocats des demandeurs.

Jugement de la Cour de Révision :

Coram SICOTTE, JETTÉ & BUCHANAN, J. J.

La Cour Supérieure siégeant à Montréal comme Cour de Révision etc.

Considérant que les demandeurs sont manufacturiers en France et qu'il n'appert pas qu'ils aient pris enrégistrement, ou fait dépôt de marque de commerce en France, quant aux choses manufacturées par eux ;

Considérant que les demandeurs réclament indemnité à raison de violation de leurs droits de marque, et qu'ils ne font apparaître que d'un enrégistrement effectué en Canada ;

Considérant que les demandeurs n'ont aucune fabrique en Canada, et qu'il n'appert pas même avec certitude qu'ils ont sur le marché des objets manufacturés par eux ;

Considérant que l'enrégistrement d'une marque de commerce n'est pas attributif de propriété, mais simplement déclaratif, et ne vaut que pour protéger une industrie réalisée dans le pays où se fait l'enrégistrement ;

Considérant que la loi du Canada n'accorde l'action pour infraction des droits de marque que si l'enrégistrement en a

été pris de la manière prescrite ; et que le fabricant étranger, qui réclame contre des violations de sa marque de fabrique, doit constater qu'il est protégé à l'encontre des tiers dans son pays par un enrégistrement de cette marque pris là, conformément à la loi sur la matière ;

Considérant qu'il est constant que dès longtemps avant l'enrégistrement invoqué par les demandeurs et leur poursuite, il se vendait à Montréal, dans le commerce de gros et de détail, des pipes portant la marque revendiquée par les demandeurs ;

Considérant qu'il est constant que le défendeur était, depuis bien des années, dans l'habitude de s'approvisionner pour les besoins de son petit négoce de pipes achetées chez des importateurs connus, croyant de bonne foi qu'elles portaient les marques légales des fabricants, et que dans tels achats et ventes il a agı sans fraude ;

Considérant qu'il n'y a pas de preuve d'aucun dommage réel et actuel causé aux demandeurs ;

Considérant qu'à raison de sa bonne foi, et dans l'absence de toute faute, le défendeur n'a encouru aucune responsabilité :

Déclare qu'il y a erreur dans le dit jugement de la Cour Supérieure en date du 28 février, 1881, l'infirme et, rendant le jugement qui aurait dû être rendu par la Cour de 1e instance, déboute les demandeurs de leur action, pour les motifs ci-dessus, avec dépens de la Cour Supérieure contre les demandeurs, et condamne les demandeurs à payer les dépens de la Cour de Révision ;

Monsieur le Juge Jetté concourt quant au dispositif de ce jugement, faisant ses réserves quant au plus grand nombre des motifs énoncés.

Jugement de la Cour d'Appel :

La Cour etc.

Considérant que les Appelants ont fait enregistrer leur marque de commerce le huit septembre 1879 ;

Considérant qu'il est établi que l'intimé a vendu des articles portant une imitation frauduleuse de la dite marque de commerce et qu'à raison de ce les Appelants ont souffert des

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dommages que la Cour de première instance, par son jugement du vingt-huit février 1881, avait fixés à vingt-cinq piastres, vû la bonne foi de l'intimé ;

Considérant qu'il y a erreur dans le jugement rendu par la Cour Supérieure siégeant en Révision, le trente septembre 1881, en ce qu'elle a débouté absolument l'action des demandeurs appelants ;

Considérant qu'il n'y a pas erreur dans le jugement rendu par la Cour Supérieure, le 28 février 1881, confirme le dit jugement dans son dispositif, en réduisant, néanmoins, vû l'entière bonne foi de l'intimé, la condamnation aux dommages à la somme de cinq piastres au lieu de celle de vingt-cinq, et les dépens en 1e instance aux fins d'une action pour ce montant en Cour de Circuit, chaque partie devant payer ses frais en Cour de révision et en Appel. (*Dissentientibus* Dorion, Juge en chef, et Cross, Juge).

Judgment reversed.

DUHAMEL & RAINVILLE, for Appellant.

R. & L. LAFLAMME, for Respondent.

QUEBEC, 8 OCTOBRE 1883.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, J. J.

LOUIS DUBOIS & *Uxor*,

Demandeurs en Cour Inférieure,

APPELANTS ;

&

LAZARE BOUCHER, *ès qualité*,

Défendeur en Cour Inférieure,

INTIMÉ.

JUGÉ :—1o. Qu'un legs d'immeubles fait aux deux conjoints par mariage, par l'ascendant de l'un d'eux, est censé fait à l'époux successible seul, et non aux deux conjointement, à moins d'une déclaration expresse à cet effet. (art. 1276, C. C.)

2o. Qu'un pareil legs ne donne pas lieu au droit d'accroissement en faveur de l'époux survivant, lorsque l'époux successible meurt avant la testateur, mais que dans ce cas le legs devient caduc. (art. 868-900, C. C.)

DORION, juge en chef. — Les Appelants Louis Dubois et Marie Caroline Dubois, sa femme, demandent par leur action le partage des biens meubles et de quatre immeubles dépendant de la succession de feu Adélaïde Huot, mère de l'Appelante, et aïeule de Louis Eugène Boucher, enfant mineur, que l'Intimé, son père et tuteur, représente en cette cause.

Par leur déclaration les Appelants allèguent que Adélaïde Huot, leur mère et belle-mère, a laissé trois héritiers, l'Appelante, sa sœur Marie Adélaïde Dubois, femme de Raymond Lambert qui a cédé ses droits aux Appelants, puis Louis Eugène Boucher, issu du mariage de l'Intimé avec feu Julie Célina Dubois ; qu'elle a laissé dans sa succession des meubles, la moitié de trois immeubles et la totalité d'un quatrième immeuble, et ils concluent à ce que l'Intimé qui, en sa qualité de tuteur, est en possession du tout, soit tenu de partager ces biens dans la proportion des deux tiers pour les Appelants et d'un tiers pour le mineur que l'Intimé représente.

L'Intimé a répondu à cette demande, que feu Adélaïde Huot, par un testament du 9 mars 1867, lui avait légué, ainsi qu'à sa femme Julie Célina Dubois, les biens dont on demandait le partage, que ce legs avait été fait aux deux conjointe-

Louis Dubois & Lazare Boucher

ment et qu'au décès de sa femme avant sa mère, il y avait eu accroissement en sa faveur, et il a conclu au renvoi de l'action.

Il a été admis de la part des Appelants qu'ils n'avaient pas droit au partage des meubles et de la part de l'Intimé que le quatrième immeuble mentionné dans la déclaration ne lui avait pas été légué et qu'il devait être partagé. La Cour de première instance a ordonné le partage de cet immeuble dans la proportion des deux tiers pour les Appelants et d'un tiers pour le mineur Intimé. Il n'y a donc de difficulté que pour les trois autres immeubles dont la moitié appartenait à la testatrice, Adélaïde Huot, lors de son décès. Les Appelants prétendent que le legs qu'Adélaïde Huot a fait à Julie Célina Dubois, sa fille, est devenu caduc par le décès de celle-ci avant la testatrice, et l'Intimé que le legs ayant été fait à lui et à sa femme conjointement, il y a eu, au décès de sa femme, accroissement du legs en sa faveur, et qu'il était par là devenu, au décès de la testatrice, son seul légataire de la moitié qui lui appartenait dans ces trois immeubles.

Voici la disposition du testament d'Adélaïde Huot qui a donné lieu à cette contestation :

" 3° Je donne et lègue à Sieur Lazare Boucher et à Dame " Célina Dubois, son épouse, ma fille et gendre, tous les " droits et prétentions que je puis avoir dans une terre de " 2½ arpents, plus ou moins de front sur 30 arpents de pro- " fondeur, située au deuxième rang de la paroisse de St. " Nicholas, bornée, etc., etc. Item tous les droits et prétentions " que je puis avoir dans une autre terre de deux arpents plus " ou moins de front, sur trente arpents de profondeur, située " au deuxième rang de la paroissse de St. Nicholas, bornée, " etc., etc. Item, tous les droits et prétentions que je puis " avoir dans un emplacement où je fais ma résidence ac- " tuelle, étant de forme irrégulière contenant environ quatre " arpents et demi, plus ou moins en superficie, situé dans le " deuxième rang des terres de la dite paroisse de St. Nicholas, " bornée, etc., etc."

" Il y a lieu à accroissement, (dit l'art. 868 du Code civil,) " au profit des légataires au cas de caducité, lorsque le legs " est fait à plusieurs conjointement. Il est réputé tel, lors- " qu'il est fait par une seule et même disposition et que le

" testateur n'a pas assigné la part de chacun des co-légataires " dans la chose léguée."

En vertu de cet article le droit d'accroissement n'a lieu qu'en faveur des co-légataires d'une même chose et si l'Intimé n'était pas co-légataire avec sa femme des immeubles légués par sa belle-mère, il ne peut en réclamer le bénéfice. Si, au contraire, il était co-légataire avec sa femme, l'article lui est applicable, le legs ayant été fait par une seule et même disposition, sans attribution de parts. Mais l'article 1276 du Code Civil décrète que : " A l'égard des immeubles, les dona- " tions par contrat de mariage, y compris celles à cause de " mort, celles faites durant le mariage, et *les legs faits par les* " *ascendants de l'un des époux* soit à celui d'entre eux qui est " leur successible, soit à l'autre, *à moins de déclaration expli-* " *cite au contraire*, ne sont censés faits qu'à l'époux succes- " sible, et lui demeurent propres comme équipollents à suc- " cession.

" La même règle a lieu lors même que la donation ou le " legs sont faits, dans les termes, aux deux époux conjointe- " ment.

" Toutes autres donations et legs ainsi faits par d'autres, " aux époux, conjointement ou à l'un d'eux, suivent la règle " contraire et entrent dans la communauté, à moins qu'ils " n'en aient été exclus spécialement."

La version anglaise plus exacte dit, " when the gift or the " legacy in its terms, is made to both consorts jointly."

Cet article prévoit trois cas, celui ou le don ou le legs est fait à l'époux successible seul, celui ou il est fait à l'époux non successible et celui ou il est fait aux deux conjointement.

Dans le premier cas, il n'est pas douteux que le décès de l'époux successible, avant le testateur, rend la disposition caduque. En effet à quel titre l'époux non successible réclamerait-il le bénéfice du legs. Il n'est pas compris dans la disposition. Le legs a été fait nommément à l'époux successible qui ne peut le recueillir qu'à titre équivalent à celui qu'il aurait eu s'il l'avait recueilli par succession. Ce legs est censé fait au légataire successible par un partage anticipé de la succession de son ascendant et l'oblige au rapport à la succession de cet ascendant, de la totalité du legs s'il consiste en un legs d'immeubles.

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L'on ne peut pas concevoir que l'époux non successible puisse se prétendre co-légataire de biens immeubles légués exclusivement à son conjoint et qui en vertu de l'article 1275 n'entrent pas en communauté lorsqu'ils échoient à l'un des époux par succession ou à titre équipollent. Or l'article 1276 dit expressément que les immeubles donnés ou légués par un ascendant à l'époux qui lui est successible, lui demeurent propres *comme équipollents à succession*, "*as being acquired* "*under a title équivalent to succession*," dit la version anglaise.

Si dans ce premier cas il n'y a pas de doute que les immeubles légués appartiennent exclusivement à l'époux successible à qui le legs a été fait par son ascendant, il ne peut y en avoir non plus dans les deux autres cas, celui où il a été fait aux deux époux et celui où il a été fait nommément à celui des deux qui n'est pas successible, puisque l'article 1276 donne le même effet aux trois dispositions et dit expressément que dans l'un ou l'autre des trois cas prévus, le legs sera censé fait à l'époux successible seul et lui sera propre.

L'Intimé ne semble pas contester que si sa femme Julie Célina Dubois avait survécu à la testatrice, sa mère, elle aurait seule recueilli les trois immeubles compris dans le legs, nonobstant que ce legs ait éte fait nommément, tant à elle qu'à l'Intimé. Cela prouve que tant que sa femme a vécu, l'Intimé n'était pas légataire conjoint de ces immeubles, puisqu'il n'en aurait rien eu, si le legs était échu du vivant de sa femme. Celle-ci était donc seule légataire, puisque le cas échéant, où elle aurait survécu à la testatrice, elle aurait seule recueilli le legs à l'exclusion de tous autres.

L'Intimé fait erreur lorsqu'il prétend que l'article 1276 ne fait que déterminer les droits des conjoints dans certains biens spéciaux qu'acquiert la société conjugale, et qu'il ne reçoit son application qu'après que les biens légués par l'ascendant aux deux époux ou même à celui des deux qui n'est pas son successible ont été apportés à la communauté par l'époux non successible, auquel ils ont été légués en tout ou en partie. S'il était vrai que l'article 1276 ne s'applique qu'aux immeubles advenant aux conjoints pendant l'existence de la communauté, il s'ensuivrait que le legs fait pendant leur mariage aux deux conjoints ou au conjoint non successible seul, par l'ascendant du conjoint successible ap-

partiendrait en entier à celui-ci, si le testateur mourait pendant la communauté, tandis qu'il appartiendrait pour moitié ou pour le tout, suivant qu'il aurait été fait aux deux conjoints ou au conjoint non successible, si le testateur mourait après la dissolution de la communauté prononcée en justice, et du vivant même de l'époux successible. Dans ce cas le légataire ne dériverait pas son droit de la volonté du testateur, mais de l'accident tout à fait étranger à la disposition qu'il a faite de ses biens, savoir que les époux ont cessé d'être en communauté de biens depuis qu'il a fait son testament.

Quoique le legs ne prenne effet, qu'à la mort du testateur, et que c'est à cette époque que l'on juge si le légataire a la capacité requise pour recueillir le legs qui lui a été fait, il faut néanmoins se reporter à l'époque du testament pour déterminer d'après ses termes mêmes, quel est celui à qui le testateur a entendu donner ses biens; en un mot la qualité de légataire est conférée par le testament au moment même où il est fait et la capacité se détermine lors de l'ouverture du legs. (*King* et *Lunstall* & al., 20 L. C. J., 49).

En ne perdant pas de vue cette distinction entre la qualité de légataire et sa capacité de recueillir le legs, l'on arrive facilement à la solution de la question qui nous est soumise. Si en effet le legs fait par un ascendant aux deux époux pendant leur mariage est censé fait au conjoint successible seul, celui-ci est de fait le seul légataire et nul événement subséquent ne peut faire passer ce legs à une autre; et si l'époux successible meurt avant le tetestateur, le legs devient caduc, à moins comme le dit Pothier, des donations testamentaires, No. 333, Ed. Bugnet, que le testament ne contienne une substitution vulgaire. A défaut de substitution et de co-légataires, la chose léguée reste par devers les héritiers et ce sont eux qui en profitent.

Ici il n'y a pas de substitution, cela est admis, et l'Intimé ne prétend pas être substitué à Julie Célina Dubois, son épouse décédée, mais il prétend avoir en son nom personnel, droit aux biens légués à sa femme, et ce en vertu d'un droit d'accroissement qu'il invoque comme existant en sa faveur. Mais l'accroissement ne se fait qu'à la chose et non à la personne, (Troplong, Don et Test. No. 2179.) Il faut que celui qui réclame ce droit ait été co-légataire, qu'il ait, en son

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propre nom, droit à une partie quelconque de la chose, dont la totalité lui a été léguée en même temps qu'à d'autres et dont quelqu'un des co-légataires ne recueille pas sa part. C'est alors que cette part accroît aux autres co-légataires, *jure accrescendi* ou plutôt *jure non decrescendi*; chacun des co-légataires étant déjà propriétaire du total de la chose léguée. (Pothier, loc. cit. No. 340).

Si je comprends bien les prétentions de l'Intimé, il n'aurait pas été co-légataire de sa femme *ab initio*, mais il le serait devenu par le décès de sa femme, ça serait le cas d'une substitution vulgaire et non d'un legs conjoint. Le testament ne contient aucune substitution et l'Intimé n'a jamais été légataire des immeubles, ni d'aucune partie des immeubles compris dans le legs fait par la testatrice Adélaïde Huot, puisque par la loi, ce legs est censé avoir été fait à la fille de la testatrice seule et non à son mari l'Intimé; car comme le dit Pothier, *Communauté*, No. 170, 2 al. "Ce donateur est facile- " ment présumé n'avoir entendu faire sa donation qu'à lui " (l'enfant ou descendant du donateur) et ne s'être servi de " ces termes *aux futurs époux*, que par rapport à la jouis- " sance de l'héritage, qui devait être commune aux futurs " pendant leur communauté......"

Idem, 3 al:......" Quoiqu'il ne soit pas parlé par la donation " de la future épouse, néanmoins le donateur est facilement " présumé avoir voulu donner à la future épouse, et n'avoir " pas entendu donner au futur époux, en son propre nom, " mais *en son nom et qualité d'époux et de mari, comme ayant* " *en cette qualité de mari, qualité pour accepter et recevoir ce* " *qui est donné pour la dot de sa femme.*"

Idem, No. 172 et 173. Renusson, de la Communauté, p. 143, No. 34 et 35. Ferrières, Cout. de Paris, t. 3, p. 642, No. 10 et suiv.

Ces autorités font voir que l'article 1276 n'est pas de droit nouveau. La règle qu'il exprime existait avant le code et les commissaires l'ont constaté dans leur 5ème rapport, p. 206, lorsqu'ils ont dit: "Cet article est conforme à la coutume de " Paris (246), à celle d'Orléans et à presque toutes les cou- " tumes de la France, quoique contraire à la doctrine du " Code Napoléon, qui a introduit une règle contraire, etc... " Les commissaires regardent l'ancienne règle comme plus " juste et plus naturelle, étant fondée sur la présomption que

" la libéralité a dû être faite à l'héritière plutôt qu'à l'étran-" ger et l'ont en conséquence maintenue."

Nous ne ferons qu'ajouter que des autorités que nous avons consultées, nous n'en avons point trouvé qui puissent soutenir la prétention de l'Intimé, qu'en vertu du testament d'Adélaïde Huot, sa belle-mère, il devait être considéré comme co-légataire de sa femme, fille de la testatrice.

L'Intimé qui a cité un grand nombre d'autorités pour établir quand et comment, il y avait lieu au droit d'accroissement, n'en a cité aucune pour établir qu'il soit dans les conditions requises pour réclamer ce droit. L'Intimé n'étant pas co-légataire ne peut réclamer le droit d'accroissement qu'il oppose à la demande en partage des Appelants et le jugement de la Cour de première instance doit être infirmé. Les conclusions des Appelants leur sont accordées excepté quant à cette partie par laquelle ils demandent le partage des meubles légués, auxquels ils n'ont aucun droit, et le partage des immeubles est ordonné dans les proportions indiquées dans la déclaration des Appelants.

Jugement infirmé.

Blanchet, *Amyot & Pelletier*, avocats des Appelants.

Morrisset & St. Georges, avocats de l'Intimé.

MONTREAL, 22 MAY 1883.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, J. J.

No. 531.

DAME ANN. E. TREACEY & VIR & AL.,

Defendants in the Court below,

APPELLANTS;

&

THOMAS LIGGET & AL.,

Plaintiffs in the Court below,

RESPONDENTS.

HELD:—That a donation by a father to his daughter in her contract of marriage, of all his unenincumbered immovable property, will be set aside, as having been made in fraud of his creditors, if by reason of such donation, the donor is unable to meet his engagements, and more particularly, if the donation was made under circumstances creating strong presumptions that the donee was aware, at the time, of the effect of the donation on the solvency of the donor.

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On the 16th day of June 1879, Martin Treacey, one of the Appellants, gave to his daughter, Ann. E. Treacey, in her contract of marriage with John Killoran, two lots of land and buildings thereon erected, situated in the City of Montreal.

These two lots of land, which were valued by the city assessors at $14,300, constituted the whole property which Treacey possessed, at the time, with the exception of another one which he had purchased from the Respondents, and on which there was still due a sum of $8,060, of which $4,030 had become payable on the 1st of July 1878 and the balance would become exigible on the 1st day of July 1883.

The Respondents, alleging the insolvency of Treacey, have instituted this action to annul the donation which he has made to his daughter, as being in fraud of his creditors.

The Appellants have pleaded denying the insolvency of Treacey, and that if he was insolvent, the donation which was made in contemplation of the marriage of the donee, was not *à titre gratuit* and could not be annulled, as she had no knowledge of the donor's insolvency, and finally that the Respondents had not brought their action within one year from the date the contract of marriage was made public by its registration.

The Court below dismissed the Appellants' pleas, and set aside the donation as having been made in fraud of the creditors, ordering at the same time that the Respondents should only recover out of the property mentioned in the donation, such balance of their claim, as might remain due, after discussion of the other property of Treacey the donor.

The Appeal is from this judgment.

Dorion Ch., J. — The Court below has considered the donation by Martin Treacey to his daughter, as having been made *à titre gratuit*, and liable to be annulled without any proof of knowledge, on the part of the donee, of the insolvency of the donor.

This question is not entirely free from difficulty. Most of the authors, both under the old law and under the French code, have considered such a donation as being gratuitous, when there was no charge attached to it; but the Courts in France since 1845, have almost invariably held the contrary.

A number of authorities are cited on this point in the case of Behan *et al* vs. Erickson and Taylor *et vir* opposants. (7 Quebec Law Rep. p. 295.) To these authorities may be added, Demolombe, vol. 25, Nos. 212 and 213; Larombière, vol. 1, art. 1167, No. 34, p. 738 and fol; Aubry & Rau, vol. 4, § 313, p. 139; Laurent, vol. 16, Nos. 452, 453, 454 and 455.

These authors are all of opinion that a donation by contract of mariage from a father to his daughter is to be considered *à titre gratuit*, and that to annul such a donation for fraud, it is not necessary to prove that the donee was aware of the insolvency of the donor.

In the present case, I do not believe that it is even necessary to enter into that question and decide whether the donation was onerous or *à titre gratuit*.

The evidence shows that Treacey gave to his daughter all the property he had, with the exception of one lot of land totally insufficient to pay the *hypothèque* with which it was burthened. His daughter was then living with him and she has continued to do so since her marriage. Treacey admits that he has nothing to do, and he makes this an excuse for continuing to administer the property which he has given to his daughter. That a man owing a large sum of money to his creditors and who has no occupation and, as he admits, is doing nothing, should give to his daughter on the occasion of her marriage, the whole of his available property worth upwards of $14,000, is sufficient to raise the strongest suspicions, as to the motive which may have prompted the donor and such suspicions could not, but reach those so intimately connected with him, as the other Appellants were.

In most cases of fraud, it is almost impossible to prove the fraudulent intent of those who are parties to it, or the knowledge of those dealing with them, except from the presumptions resulting from the circumstances of each case. Chardon, traité du dol, vol. 2, No. 203, p. 369...... "Si la "preuve directe n'est pas possible, il en est d'indirectes que "fournissent les présomptions offertes par les circonstances."

Bédaride, de la Fraude, vol. 1, No. 254. "Dans tous les cas "où la preuve testimoniale est admise, la preuve par pré-"somption l'est également."

Laurent, vol. 16, No. 450, p. 519.—Aubry et Rau, vol. 4, p. 137.

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In order that the donation be annulled, it is not necessary to prove that Treacey was insolvent when he made it. It is sufficient that by making it, he, with intent to defraud his creditors, so reduced his assets, that he became unable to pay his debts.

Bell & Rickaby, 3 Quebec Law Rep. pp. 243, 248 et 249.

Ricard in his Traité des donations, vol. 1, p. 250, No. 1113, mentions a case very similar to the present one, in which a donation made by a father to his son, in the contract of marriage of the latter, was annulled:

"On pourrait encore (says this writer) prétendre que cette "question (si la donation devait être insinuée) a été jugée "par arrest intervenu conformément aux conclusions de M "l'Avocat Général Bignon, en l'audience de la Grande "Chambre, le lundy 15 janvier 1663, au rôle d'Amiens, mais "ayant été présent lors de la plaidoirie de la cause, je puis "rendre ce témoignage, que le sort de la contestation fut sur "ce qu'il y avoit *une présomption violente*, que le père avoit "fait à son fils, par son contrat de mariage, la donation dont "il s'agissoit, en fraude de ses créanciers, en conséquence de "ce qu'elle contenoit tous les immeubles qu'il possédoit, et "et qu'il avait fait banqueroute un an après."

The circumstance that the donor had become bankrupt a year after he had made to his son in his contract of marriage, a donation of all his real estate, was considered a sufficient presumption of fraud to annul the donation. The presumption is greater in this cause since the donation was the sole and immediate cause of the insolvency of Treacey the donor.

It is contended on behalf of the Appellants that the insolvency of Treacey has not been proved to exist on the day the donation was made or immediately after. The evidence adduced by the Respondents is uncontradicted, and it shows conclusively that when the witnesses examined the only property retained by Treacey, it was only worth $6,000, while he owned a balance of $8,060 on the price of it, or $2,060 more than it was worth. It is also proved that real estate in the city of Montreal had rather increased in value since the date of the donation. This was quite sufficient to throw on the Appellants the onus of establishing Treacey's solvency, at the date of the donation, by proving that the

value of the property retained by him was greater than that stated by the Respondents' witnesses, or that it had diminished in value since the donation had been made. The Appellants having adduced no evidence are bound by that produced by the Respondents.

The judgment of the Court below in ordering that the property remaining in the possession of Treacey should be sold before those comprised in the donation, has fully protected the interests of the Appellants, in as much as they will not be disturbed in the possession of the property given to the female Appellant, if the proceeds of the other property is sufficient to pay the claim of the Respondents; and should it prove insufficient, it will afford additional evidence of the insolvency of the donor.

This order was hardly necessary, for it has already been decided by this Court in a case of Bernard vs. Lanctot & al., on the 10th of March 1849, that a creditor might bring an action to set aside a donation made in fraud of his rights without discussing the donor and that the discussion became necassary only when it was required by the donee. The judgment of the Court below is affirmed.

TESSIER, J.—Je ne désire ajouter que quelques mots pour dire que je concours dans le jugement rendu, mais avec cette réserve que je tiens fermement à l'opinion que la donation ou constitution de dot faite par le père à sa fille, dans le contrat de mariage de cette dernière, est une donation à titre gratuit, non pas onéreux, même si elle eût été faite au mari ou aux deux conjoints.

Dans le cas actuel la donation de l'immeuble a été faite par le père *à sa fille seulement*, dans le contrat de mariage, cela souffre moins de difficulté. Il suffit que la fraude remonte au père, au donateur seul, pour faire annuler la donation.

Cette question a été très bien traitée dans une cause récente à Québec, *Behan* contre *Erickson*, 7 Rapports jud. de Québec, page 295.

Demolombe, 25 vol. Nos. 212 et 213, s'exprime avec beaucoup de force sur cette matière, il conclut en disant: " nous " croyons avoir démontré que les textes de la loi et les prin- " cipes commandent de décider que l'action Paulienne est

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"admissible contre la femme dotée ; lors même qu'elle n'a "pas été complice de la fraude du constituant."

Il cite plusieurs auteurs entr'autres Zachariæ, Aubry et Rau, vol. 3, p. 93 et 94.

Il me semble que cette doctrine résulte bien de la nature du mariage dans nos mœurs et dans nos lois. Le jugement *à quo* est fort bien motivé et je concours dans les motifs et le dispositif de ce jugement.

CROSS, J., dissenting.—This action was brought to set aside a gift made by Martin Treacey to his daughter Ellen Treacey and to her husband John Killoran, contained in their marriage contract executed 16th June 1879, to which Martin Treacey was a party, for the purpose among other things of conveying to them, in consideration of their marriage, property of considerable value.

The wrong which Liggett & al. complained of was, that having sold Martin Treacey a property on the 28th June 1876, which had only been partly paid for, a balance remained due to them thereon, secured only by the property so sold, which having become depreciated in value was insufficient to cover their claim; the gift in this marriage contract had reduced Martin Treacey to a state of insolvency and had been made in fraud of Liggett & al. whose claim remained unsatisfied. They further alleged that at the time the gift in question was made, Martin Treacey was notoriously insolvent; that he had remained in possession of the property so given, the same as before the date of the gift, and that a year had not elapsed since they, Liggett & al, had become aware of the existence of the donation, they therefore claimed that the donation in question should be set aside and annulled.

The Defendants each pleaded separately, but to the same effect. By a special categorical denial of each of the averments in the declaration, especially the averments of insolvency, fraud, or wrong doing. Also a further plea amounting to a plea of prescription under art. 1040 of the Civil Code, namely that the action had not been brought within a year after Liggett & al had obtained knowledge of the donation which had been made public by registration.

The judgment maintained the action and annulled the

donation, requiring however that Liggett & al should discuss the other property of Martin Treacey before taking recourse against that in question. Dame Treacey & Thomas Ligget

The facts show that by deed dated the 28th June 1876, Liggett & al had sold Martin Treacey a property for $12,250 whereof $3,787 were paid in cash, and the balance was made payable to the acquittal of Liggett & al, viz: $403 to A. M. Foster 1st November 1876, and the balance to the Liverpool London & Globe Insurance Co. as follows, viz: $4030 on the 1st July 1878, and $4030 on the 1st July 1883.

The contract of marriage complained of was made 10th June 1879, and contained a large amount of valuable property which Martin Treacey thereby transferred to his daughter and son in law, and was duly enregistred.

Martin Treacey being examined, admits that besides the property he gave to his daughter and her husband, he held no other than that sold to him by Liggett & al; also that they had taken judgment against him for the first instalment due under his deed of purchase, and seized and sold his moveables; further that since his daughter's marriage, they had lived together on the property he had given her.

There is no proof of Martin Treacey's insolvency at the date of the donation, unless it is to be inferred from the fact that there remained to him only the real property he bought from Liggett & al.

There is no proof of fraud or collusion on the part of the daughter or of her husband.

I do not think that the donation in the marriage contract is to be considered gratuitous, but I will not enter into that question.

To my mind an action of this kind and under the circumstances of this case, should not be maintained without a sufficient complete proof of the allegations necessary to sustain it.

There is no proof of the value of the property still held by Martin Treacey at the date of the donation 16th June 1879.

Two witnesses were examined on this point on the 12th November 1881.

William J. Shaw, auctioneer, states that on that day 12th November 1881 subdivision No. 40, No. 1206 St Ann's Ward, he considers worth about $6000.

Oliver W. Stanton, real estate agent, being examined, states that he considers about $6000 is a very fair value for No. 1206 subdivision 40 St Ann's Ward, the houses he says are in bad order and the building also.

He is then asked : Is it worth to-day as much as it was two years ago ?

Answer.—I did not see it two years ago.

Question.—Supposing the property to be in the same state, was it more valuable two years ago than to-day ?

Answer.—No, I consider property a little better now than it was two years ago, although there is very little change in price.

Supposing the properties spoken of in these two depositions to be the same as that sold by Liggett & al to Martin Treacey, they yet make no proof of the value on the 10th June 1879, and they but give a vague opinion of its value at the date of these depositions.

Stanton, the only witness who speaks in a retrospective sense, admits the property to be in very bad order when valued 12th November 1881, a circumstance which of course made it of less value than if it had been in good condition. He did not know it two years previously when presumably it would have been in better order and worth more, and that only carried back the valuation to the 12th November 1879, whereas the donation was made 10th June 1879, nearly five months previously. Property often fluctuates largely in value in five months.

On the 28th June 1876, it was presumably worth $12,250, for that was the price at which Liggett & Co. agreed to sell it, and Martin Treacey agreed to buy it. If it took five years and between four and five months to deteriorate in value down to $6000, it ought to have been worth from $6000 to $9000 in 1879, on the 16th June, the date of the donation. This valuation at that time would have been more than sufficient to cover the claim of Liggett & al apart from any personal or other property Martin Treacey may then have possessed.

I think the proof of the value of the property at the date of the donation is insufficient, in fact wholly wanting.

The presumption of value established by the sale from Liggett & al to Treacey, on the 28th June 1876, remains

until destroyed by a counter proof and there is no proof to affect it at the date of the Gift in the marriage contract on the 16th June 1879

In a case like the present where the Respondents claim the benefit as well of their own as of another, and that a depreciated value and seek the extraordinary remedy of setting aside a mariage contract, and the basis of the case is a fluctuation of value, I would not aid the remedy by supposition or inference, but would hold the party taking the remedy bound to make out his case by sufficient proof, which I think they have failed to do. I would therefore reverse the judgment of the Court below and dismiss the Respondent's action.

The plea of prescription raises an important question which would remain to be determined if even the case had been made out in evidence. Liggett & Co. having denied knowledge of the donation within the year previous to their action, was this sufficient to cast the burthen of proof of such knowledge on the Defendants, and if so did the Defendants prove it by proving that the donation was registered? Is registration notice? From my point of view it is unnecessary to solve these questions, but they should have been passed upon before giving the Plaintiff Judgment.

Judgment confirmed.

Doutre & Joseph, for Appellants.

Judah & Branchaud, for Respondents.

MONTREAL, 22 MAI 1883.

Coram DORION, J. C., MONK, TESSIER, CROSS, BABY, J. J.

No. 409.

GUILLAUME LEFAIVRE,

Demandeur en Cour Inférieure,

APPELANT;

DAME EMMA L. GUY ET VIR,

Défendeurs en Cour Inférieure.

JUGÉ :—Conformément aux décisions rendues dans les causes de *Hudon* et *Marceau, Pacquet* et *Guertin, Bruneau* et *Barnes*; que la femme séparée de biens n'est pas tenue pour les fournitures avancées au mari pendant le mariage pour sa famille.—*M. le juge Tessier différant.*

Guil. Lefaivre & Dame Guy

DORION, juge en chef.— L'Appelant poursuit l'Intimée, séparée de biens d'avec son mari, pour le montant d'un compte de vins et d'épiceries qu'il a fournies pour l'usage des Intimés et de leur famille.

L'Intimée a répondu que ces effets avaient été vendus à son mari, qui, par leur contrat de mariage, était seul tenu de pourvoir au soutien de la famille.

Nous avons déjà décidé dans les causes de *Hudon* et *Marceau*, (23 L. C. J. 45) de *Pacquet* et *Guertin*, jugée le 14 juin 1879, et dans celle de *Bruneau* et *Barnes*, (25 L. C. J. 245) que la femme séparée de biens n'était pas responsable pour les fournitures faites pour les besoins de la famille, lorsque les avances et le crédit avaient été faits au mari. Ici les articles fournis ont été chargés dans les livres de l'Appelant au débit du mari de l'Intimée ; c'est lui qui a payé des à comptes, en sorte qu'il ne peut y avoir de difficulté, que c'est à lui et non à l'Intimée, sa femme, que l'Appelant a fait crédit.

Mais l'on dit : l'Intimée a elle-même donné des ordres et même des ordres par écrit, pour une partie des effets fournis par l'Appelant, et de plus elle a des revenus considérables et son mari n'a rien. Dans la cause de Hudon et Marceau, c'était la femme qui avait acheté seule, toutes les marchandises pour lesquelles elle était poursuivie, mais ces marchandises avaient été portées au débit du mari dans les livres du créancier, et nous avons jugé, conformément aux autorités citées dans les notes publiées, qu'elle n'avait acheté que pour son mari et en vertu de l'autorisation tacite qu'il était censé lui avoir donnée pour acheter ce qui était nécessaire pour les besoins de la famille. Quant à l'assertion que le mari n'a rien et que l'Intimée a des revenus considérables, il est prouvé que l'un et l'autre ont d'amples revenus ; mais ceux du mari, paraît-il, sont insaisissables. Ce n'est pas là une raison pour faire payer à la femme les dettes du mari, pour lesquelles elle ne peut pas même s'obliger. (art. 1301 C. C.)

Renusson, Traité de la Communauté, p. 164, No. 53 fait justice de la prétention des Appelants, en disant : "......Ceux " qui fournissent au mari des choses qu'il demande pour la " dépense qu'il fait dans sa maison pour lui, sa femme, ses " enfants, et ses domestiques, suivent la foy du mari qui est " obligé de soutenir toutes les charges du mariage. S'ils veu-

" lent faire crédit au mari, ils se doivent imputer leur facilité, il ne serait pas juste que le mari consommât les biens de la communauté, et les jouissances des biens propres de sa femme, qui sont destinés pour ses nourritures et l'entretien, et que la femme demeurât encore obligée à ceux qui auraient fait crédit à son mari, sous prétexte que la femme aurait été nourrie et entretenue pendant la communauté ; si cela avait lieu la femme payerait deux fois ses nourritures et entretien, les créanciers se doivent pourvoir sur les biens de la communauté et sur les propres du mari."

Renusson ne parle, il est vrai, que de la femme commune, mais les mêmes raisons s'appliquent à l'espèce actuelle, puisqu'ici le mari, s'est obligé par son contrat de mariage de payer seul toutes les dépenses du ménage.

Sans revenir sur la jurisprudence établie par cette Cour même, il est impossible de condamner l'Intimée à payer pour les fournitures faites à son mari et le jugement de la Cour de 1ère instance qui a renvoyé l'action des Appelants est confirmé.

Tessier, juge, *dissentiente.*—Il s'agit en cette cause de la responsabilité de la femme séparée de biens pour effets nécessaires à la subsistance et nourriture de la famille, lorsque le mari est insolvable.

L'Appelant Lefaivre réclame des défendeurs Charles Boyer et Dame Emma Guy, son épouse séparée de biens, la somme de $1744 pour épiceries à eux vendues et livrées à Montréal du 1er août 1874 au 30 avril 1875.

Le mari Boyer a fait cession de biens en vertu de la loi de faillite et a été déclaré publiquement insolvable en vertu de cette loi le 18 février 1875. La demande allègue l'insolvabilité du mari, que les effets fournis sont de première nécessité, eu égard à la position sociale des parties et que la femme jouit d'une fortune considérable, et conclut à la condamnation solidaire des deux époux.

La femme a plaidé que par son contrat de mariage elle est séparée de biens et qu'il y est stipulé que son mari est tenu de subvenir à l'entretien de la famille.

La Cour inférieure a condamné le mari pour toute la somme demandée, mais a débouté l'action quant à la femme.

Guil. Lefaivre & Dame Guy

C'est de ce jugement absolvant la femme de toute responsabilité que Lefaivre appelle à cette Cour.

Il est en preuve que le compte a été ouvert au nom de M. Charles Boyer seul, qui était réputé être alors riche. La règle que le crédit a été fait au mari s'applique bien jusqu'à la date de la faillite publique du mari, mais pas après cela.

Il me paraît déraisonnable de croire que l'épicier a eu l'intention de faire crédit et d'avancer ses effets à un insolvable. La preuve en cette cause me paraît démontrer le contraire par plusieurs circonstances. Mme Boyer a été elle-même quérir des effets, elle a donné des ordres par écrit sous sa propre signature.

La femme commune en biens est présumée agir pour son mari, mais cette présomption n'existe pas pour la femme séparée de biens, elle est séparée pour pouvoir s'obliger elle-même.

Le témoin P. G. Charlebois s'est rendu chez madame Boyer pour l'engager à payer cela, elle a répondu : " *Tell Lefaivre I will pay them.*"

Le témoin Rose dit : "She said (Mrs. Boyer) that as soon " as she got the money, that she would pay all."

Il est prouvé que Madame Boyer jouit d'un revenu de $6000 par année, et son mari jouit encore d'un revenu de $2400 par année, mais ce revenu du mari n'est pas saisissable, autrement il eût été abandonné à ses créanciers.

Sera-t-il permis à ces deux défendeurs de s'enrichir aux dépens d'autrui ou autrement de profiter des effets de nécessité fournis pour leur subsistance par un épicier, sans les payer. Ce n'est pas à mon avis le sens de la décision qui a été prononcée par cette Cour *in re Hudon et Marceau* 23 L. C. Jurist p. 46.

La présente cause tombe dans l'exception à la règle générale exprimée dans l'article 1317 de notre Code C. comme suit :

" La femme qui a obtenu la séparation de biens doit contribuer proportionnellement à ses facultés et à celles de " son mari, tant aux frais du ménage qu'à ceux d'éducation " des enfants. Elle doit supporter entièrement ces frais, s'il " ne reste rien au mari."

La bonne jurisprudence sur ce point est exemplifiée dans la cause de *McGibbon* et *Morse*, 21 L. C. Jurist. 311 en 1877. Held : "That if the husband is without means (husband's

" insolvency under the statute) the creditors may claim from " the wife payment of household debts for necessaries sup-" plied *after the husband's insolvency.*"

Guil. Lefaivre & Dame Guy

4 Demolombe, p. 4 et 5.

2 Troplong, mariage, p. 722.

Appliquant ces principes au cas actuel je dis que Madame Boyer ne peut pas être condamnée pour la partie du compte qui a précédé la faillite de son mari, mais qu'elle doit être condamnée pour la partie des effets vendus et livrés depuis le 18 février 1875, date exacte de la faillite publique de son mari, savoir : pour la somme de $528 avec intérêt et dépens. Cependant la majorité de cette Cour est d'un avis contraire. Je me suis cru obligé de motiver mon dissentiment.

Jugement confirmé.

Duhamel, Pagnuelo & Rainville, pour l'Appelant.

Doutre & Joseph, pour les Intimés.

MONTRÉAL, 31 OCTOBRE 1883.

Coram DORION, juge en chef, MONK, RAMSAY, TESSIER, CROSS, J. J.

CHINC & VIR,

Défendeurs en Cour de 1re instance,

APPELANTS ;

&

THE TRUST & LOAN COMPANY OF CANADA,

Demanderesse en Cour de 1re instance,

INTIMÉE.

JUGÉ :—(Cross, juge différant), Que lorsque par une opposition afin de distraire à une saisie d'immeubles l'Opposant ne réclame qu'une partie indivise des immeubles saisis, le créancier saisissant ne peut faire ordonner la vente de la partie qui n'est pas réclamée par l'Opposant avant que la contestation sur l'opposition ne soit vidée, ou du moins sans donner avis de sa Requête à la partie saisie.

DORION, juge en chef.—La Compagnie Intimée ayant fait saisir les immeubles de l'Appelante, Léonard Bolduc et autres ont fait une opposition afin de distraire, par laquelle ils ont réclamé les quatre neuvièmes d'un dix huitième des immeubles saisis.

L'Appelante, défenderesse en Cour de première instance, a

Chine et vir. & The Trust and Loan Co. of Ca.

contesté l'opposition. Le 10 juin 1882 l'Intimée a déclaré qu'elle n'entendait pas contester et deux jours après, elle a fait motion qu'il fût ordonné au Shérif de procéder à la vente du reste des deux propriétés saisies et ce par indivis, en déduisant la part pour laquelle l'opposition avait été faite.

Cette motion a été accordée sans qu'aucun avis ait été donné à l'Appelante qui avait alors contesté l'opposition afin de distraire des Opposants.

L'Appelante se plaint de ce jugement et invoque l'article 586 du Code de procédure et l'article 84 des règles de pratique.

D'après l'article du Code, " après le rapport de l'opposition, l'Opposant peut par Requête sommaire faire enjoindre aux autres parties dans la cause de déclarer si elles entendent l'admettre ou la contester, et à défaut de telle déclaration l'Opposant a droit à main levée et aux dépens contre le saisi, à moins que le tribunal n'en ordonne autrement. La règle 84 des règles de Pratique veut que lorsqu'un demandeur déclare qu'il n'entend pas contester une opposition afin d'annuler, afin de distraire ou afin de charge, l'Opposant aura droit à avoir main-levée de la saisie, sans faire de preuve, pourvu que le défendeur sur une règle à cet effet ,ne s'y oppose pas, ou ne déclare pas qu'il entend contester l'opposition.

D'un autre côté l'Intimée invoque l'article 653 du C. de P. qui veut que, " nonobstant toute opposition faite à la saisie ou vente des immeubles ou rentes, le shérif est tenu de continuer les publications prescrites par le code ; mais il ne peut, en ce cas, procéder à la vente sans l'ordre du tribunal.

Néanmoins lorsque l'opposition est fondée sur des moyens qui ne tendent qu'à faire réduire le montant réclamé, le Demandeur, en donnant avis à l'Opposant, qu'il admet l'opposition, peut faire procéder à la vente conformément aux conclusions de cette opposition.

Il résulte de ces dispositions que le Défendeur, sur qui la saisie a été pratiquée, a droit de contester les oppositions faites à cette saisie, ce que l'Appelant a fait dans le délai requis.

La première partie de l'article 653 ordonne au Shérif de continuer ses annonces nonobstant les oppositions, mais lui défend de vendre sans un ordre de la Cour. La section 17, § 3 du ch. 85 des Statuts Refondus du B. C. était plus précise

et disait : " mais il ne procédera pas à la vente jusqu'à ce " que telle opposition ait été décidée."

L'art. 653 n'est pas donné comme étant de droit nouveau et lorsqu'il parle d'un ordre de la Cour, c'est évidemment d'un ordre qui dispose de l'opposition, comme cela était requis en vertu des Statuts Refondus que nous venons de citer, et lors même que cet ordre pourrait être donné sans égard au mérite de l'opposition, il faudrait au moins que les parties intéressées eussent avis de la demande qui en serait faite, et le saisi est nécessairement l'une des parties intéressées dans la saisie et vente de ses immeubles.

La seconde partie de l'article 653 ne s'applique qu'au cas où une opposition a été faite parce que la saisie a été pratiquée pour une somme plus forte que celle réellement due ; alors il est loisible au saisissant de se désister de partie de sa demande et en donnant avis à l'Opposant de son désistement il peut procéder à la vente des biens saisis conformément aux conclusions de l'opposition. Dans ce cas, la seule partie intéressée est le saisissant, et il est juste qu'en acquiesçant aux conclusions de l'Opposant il puisse, sans retard, faire procéder à la vente des biens saisis. Cela ne s'applique nullement à une opposition afin de distraire qui a pour objet, non de faire réduire le montant réclamé par le saisissant, mais de diminuer les objets saisis au détriment de la partie saisie.

Dans cette cause le saisissant veut faire vendre une partie indivise d'immeubles que l'Appelante réclame comme lui appartenant en entier. Elle a un grand intérêt à ce que l'on ne morcèle pas sa propriété de manière à en vendre aujourd'hui les trente-cinq trente-sixièmes et plus tard l'autre trente-sixième, si l'opposition afin de distraire est renvoyée. Nous regrettons l'irrégularité qui nous force à infirmer le jugement prononcé par la Cour de première instance, car l'opposition porte un caractère tout à fait singulier. C'est le mari de l'Appelante qui a donné l'affidavit requis pour la faire recevoir et c'est lui qui autorise sa femme à la contester. Mais nous ne pouvons sur un simple soupçon la déclarer frauduleuse.

Le jugement est infirmé avec dépens et tous les procédés

depuis et y compris la motion du 12 juin 1882 sont mis de côté.

Jugement infirmé.

Lacoste, Globensky, Bisaillon & Brosseau, pour les Appelants.
Judah & Branchaud, pour l'Intimé.

QUEBEC, 8 OCTOBRE 1883.

Coram DORION, juge en chef; RAMSAY, TESSIER, CROSS & BABY. J. J.

F. X. O. MÉTHOT,

Défendeur en Cour de 1re Insance,

APPELANT;

&

DAME M. C. H. DUFORT & VIR, *ès qualité,*

Demandeurs en Cour de 1re Instance,

INTIMÉS.

JUGÉ:—Que le Tuteur dont la tutelle a été annulée et qui a rendu un compte de son administration, aux nouveaux Tuteurs, qui lui ont succédé et qui ont reçu les pièces justificatives et le réliquat de compte reconnu par le rendant compte, n'est pas tenu de rendre un autre compte en justice; et que les nouveaux Tuteurs qui n'ont pas accepté le compte qui leur a été rendu avec les formalités requises par la loi, n'ont d'action que pour débattre et faire réformer le compte présenté, et non une action en reddition de compte.

DORION, juge en chef.—Le deux novembre 1867, l'Appelant a été nommé Tuteur à Marie Louise Blanche Méthot, fille mineure issue du mariage de l'Intimée Dame M. C. H. Dufort avec feu Jules Vital Alexandre Méthot.

Cette tutelle a été annulée le 8 juillet 1881, parce que l'Appelant n'avait pas été nommé tuteur dans le district où sa pupille avait son domicile, et le 29 novembre suivant, les Intimés ont été nommés tuteurs conjoints pour remplacer l'Appelant.

Le 13 juin 1882, l'Appelant fit dresser par Maître Glackemeyer, notaire, à Québec, où il avait été nommé tuteur, un compte de la gestion et administration qu'il avait eues des biens de la mineure. Ce compte qui est dans la forme requise par la loi, a été assermenté par l'Appelant. Les pièces justificatives du compte et les titres et papiers de la succes-

sion furent déposés chez le notaire avec, en outre, une somme de $490.46 dont l'Appelant se reconnaissait réliquataire. Les Intimés ont été informés de cette reddition de compte; ils ont examiné le compte, en ont reçu une copie, et ils ont de plus reçu les pièces justificatives du compte, les titres et papiers de la mineure et la somme de $490.46, que l'Appelant avait reconnu devoir pour réliquat de compte, mais ils n'ont pas déchargé l'Appelant de son administration.

Le 6 mars 1882, les Intimés sans aucun égard au compte que leur avait rendu l'Appelant, ont porté cette action, par laquelle ils concluent à ce que l'Appelant soit condamné à rendre aux Intimés un compte *à l'amiable si faire se peut, sinon en justice* des tutelle, gestion et administration qu'il a eues de la personne et des biens de la dite mineure Marie Anne Louise Blanche Méthot, depuis le deux novembre 1867, jusqu'au 29 novembre 1881, etc.

La Cour de première Instance a accordé les conclusions des Intimés et a condamné l'Appelant à rendre un compte dans les termes mêmes de la demande, c'est-à-dire, *à l'amiable, si faire se peut, si non en justice.*

L'Appelant, qui a déjà rendu un compte à l'amiable sans attendre des poursuites judiciaires, appelle de ce jugement et soumet qu'ayant déjà rendu un compte de sa gestion, dans les formes requises par la loi, et ayant payé le réliquat qu'il avait entre les mains, il n'est pas tenu de rendre un second compte, et d'avancer de ses propres deniers, puisqu'il n'en a plus entre les mains appartenant à sa pupille, le coût de ce compte ou du moins d'une copie de celui qu'il a déjà rendu. Ça serait admettre que celui qu'il a rendu était insuffisant et s'exposer à en payer les frais.

Nous croyons que l'Appelant a fait tout ce qu'il était tenu de faire, et que si les Intimés ne sont pas satisfaits du compte qu'il leur a présenté, il leur est loisible de prendre en justice des procédés pour débattre ce compte et le faire réformer; mais non de demander un nouveau compte qui ne peut être que semblable à celui déjà rendu.

Les Intimés ont cité quelques autorités pour établir que tant que le tuteur n'avait pas obtenu sa décharge il était comptable, et que n'ayant pas accepté le compte rendu à l'amiable par l'Appelant, ils avaient le droit de lui en demandé un en justice. Ces autorités ne sont pas concluantes. Lau-

Méthot & Dame Dufort

rent, T. 5, p. 139, No. 125 cite un arrêt du 9 juillet 1855, où suivant lui, l'on aurait jugé qu'un tuteur qui avait déjà rendu un compte à sa pupille devenue majeure et qui lui avait remis les pièces justificatives, qu'elle aurait détruites, aurait été condamné à rendre un autre compte ; mais en référant à cet arrêt qui est rapporté par Dalloz (année 1856, 2, 80), il ne paraît pas que le tuteur eut rendu un compte à sa pupille, mais qu'il lui avait seulement remis les pièces justificatives qu'elle avait détruites sans doute pour le dispenser de rendre un compte, et en effet cet arrêt est cité à le suite d'un autre pour établir que tout traité entre le mineur et son tuteur, pour dispenser ce dernier de rendre compte de sa gestion, est radicalement nul. Cet arrêt ne décide pas ce que Laurent infère et ne supporte pas les prétentions des Intimés.

Les Intimés ont aussi cité un extrait des observations faites par le juge en chef Meredith, dans une cause de Trudelle et al., vs. Roy dit Audy, (4 L. C. R. 223) qui, sans se prononcer sur la question, aurait dit que dans une cause de Legault et Neveu jugée vers 1846, la Cour du Banc de la Reine aurait renvoyé une défense par laquelle le défendeur alléguait qu'il n'était pas tenu de rendre un compte en justice, parce qu'il en avait déjà rendu un avant l'action ; que ce jugement aurait été confirmé en Cour d'Appel, et qu'un jugement semblable aurait été rendu à Trois-Rivières, en 1853, dans une cause d'Olivier vs. Labarre.

Ces causes n'ayant pas été publiées, il est impossible de dire si ces jugements ont été rendus sous des circonstances semblables à celles que l'on trouve dans celle-ci. Nous avons eu l'occasion de voir les jugements prononcés par le tribunal de première instance et sur l'appel dans la cause de Legault et Neveu. Ces jugements ne sont pas motivés ; ils ont été prononcés sur le mérite de la demande même, en sorte qu'il est impossssible de dire pourquoi les Exceptions du Défendeur ont été rejetées.

Les Intimés ont encore cité ce passage d'Aubry et Rau, t. 1, § 121, p. 489 : " Il est, du reste, bien entendu que si les précédents tuteurs n'avaient point encore rendu leurs comptes, *ou s'ils n'avaient pas eneore obtenu leur décharge*, le dernier tuteur ou le ci-devant pupille pourraient soit les actionner en reddition de compte, *soit débattre les comptes qu'ils auraient présentés.*"

Deux cas sont ici prévus, celui où les précédents tuteurs n'ont pas encore rendu leurs comptes, et celui ou ayant rendu leurs comptes, ils n'ont pas encore obtenu leur décharge, dans le premier cas le nouveau tuteur ou le ci-devant pupille peuvent les actionner en reddition de compte, et dans le second ils peuvent débattre les comptes qu'ils ont présentés.

Ici l'Appelant, pour éviter les frais de poursuites judi ciaires a présenté son compte en bonne et due forme et il a fait tout ce qu'il était tenu de faire en déposant les pièces justificatives et le réliquat, dont il se reconnaissait comptable. Dans ce cas, suivant l'opinion d'Aubry et Rau, les Intimés devaient débattre le compte présenté par l'Appelant et non pas lui demander un nouveau compte, et c'est ce que nous décidons dans cette cause. Le jugement est infirmé et l'action des Intimés renvoyée, sauf recours.

Jugement infirmé.

Malhiot, C. R., pour l'Appelant.

Gérin et Gervais, pour les Intimés.

MONTRÉAL, 31 OCTOBRE 1883.

Coram DORION, juge en chef ; MONK, RAMSAY, TESSIER, BABY, J. J.

No. 492

JOSEPH OLIVIER LAMARCHE,

APPELANT ;

&

EUSÈBE PA[illegible]ZÉ, *ès qualité*,

INTIMÉ.

JUGÉ :—Qu'un curateur à une succession vacante ne représente que la succession et le défunt, et qu'il ne peut demander la nullité d'un acte fait par le défunt en fraude de ses créanciers. Cette action n'appartient qu'aux créanciers.

L'Appelant, créancier de feu John Henry Pangman, a fait une opposition afin de charge à la saisie de la seigneurie de Lachenaie, sur l'Intimé, curateur à la succession vacante de M. Pangman.

Par cette opposition l'Appelant demandait à ce que la vente de la seigneurie ne fût faite qu'à la charge d'un transport que M. Pangman lui avait fait, le 9 janvier 1879, de 15 années des rentes constituées représentant les rentes seigneu-

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riales de la seigneurie, pour assurer le paiement d'une somme de $5,000 qu'il lui devait, avec intérêt à raison de huit pour cent.

L'Intimé, en sa qualité de curateur, a contesté cette opposition, en alléguant qne le transport que l'Appelant invoquait avait été fait dans un temps où M. Pangman était notoirement insolvable et dans le but de donner à l'Appelant, qui connaissait cette insolvabilité, une préférence illégale sur ses autres créanciers, et il a demandé à ce que cet acte de cession fut déclaré nul et l'opposition de l'Appelant renvoyée.

Après une longue enquête, la Cour de première instance a déclaré que l'acte de cession était nul, comme ayant été fait en fraude des créanciers de M. Pangman, et elle a renvoyé l'opposition de l'Appelant.

Dorion, juge en chef.—Avant d'arriver au mérite de cette contestation, il y a une question préliminaire a décider. C'est celle-ci. L'Intimé avait-il, en sa qualité de curateur, le droit de demander la nullité d'un acte fait par celui qu'il représente, parce que cet acte aurait été fait en fraude des droits des créanciers du cédant.

L'action paulienne appartient aux créanciers qui ont été lésés par l'acte de leur débiteur fait en fraude de leurs droits. Le débiteur lui-même ne peut demander la nullité d'un pareil acte. C'est lui qui a commis la fraude, si fraude il y a, et il ne peut s'en prévaloir pour faire mettre de côté un acte qu'il a volontairement consenti. Le curateur à une succession vacante est nommé par les créanciers de la succession, il est vrai, mais ce n'est que parce qu'il n'y a qu'eux qui aient intérêt à la bonne administration des biens, après que la succession est devenue vacante par la renonciation des héritiers légitimes ; cependant, tout en étant nommé par les créanciers, il ne représente que le défunt et non ses créanciers. Il ne peut intenter que les actions que le défunt aurait lui-même pu porter, en sorte qu'il ne peut demander en justice la nullité d'un acte, fait par celui qu'il représente sous le prétexte que cet acte aurait été fait en fraude des droits des créanciers.

L'art. 686 C. C. définit les droits et devoirs du curateur à une succession vacante, lorsqu'il dit que ce curateur, "administre les biens de la succession, en exerce et poursuit les

droits, répond aux demandes portées contre elle et rend compte de son administration. Aussi Denisart vo curateur dit: "Ce curateur représente la succession et le défunt." Chabot, des Suc., vol. 3, sur l'art. 813, p. 57: "Le curateur représente la succession." Ce curateur n'exerce donc que les droits de la succession, c'est-à-dire ceux que le défunt aurait lui-même pu exercer s'il eut vécu.

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Laurent, t. 10, No. 205, p. 236. "On demande si le curateur peut provoquer la nullité des actes que le défunt aurait faits en fraude de ses créanciers. La négative est certaine; d'après l'art. 1167, les créanciers ont l'action paulienne, c'est donc à eux à l'intenter."

C'est en effet ce que les Cours ont plusieurs fois jugé et de la manière la plus formelle par deux arrêts rapportés dans Sirey, 1864, 2, 207, et Sirey, 1870, 2, 315.

Nous sommes d'opinion que le défaut de qualité de l'Intimé est fatal et, sans examiner les autres questions qui ont été soulevées, le jugement de la Cour de première instance doit être infirmé et l'action de l'Intimé déboutée.

Jugement infirmé.

MM. Archambeault & Archambeault, pour l'Appelant.

MM. Bethune & Bethune, pour l'Intimé.

MONTRÉAL, 24 SEPTEMBRE 1883.

Coram DORION, juge en chef, MONK, RAMSAY, TESSIER, BABY, J. J.

No. 38.

McCRAKEN & AL.,

Demandeurs en Cour de 1ère Instance,

APPELANTS.

&

LOGUE,

Défendeur en Cour de 1ère Instance,

INTIMÉ.

JUGÉ : 1o. (Dorion, juge en chef, différant) ; Que la nomination d'un séquestre ordonnée par un juge de la Cour Supérieure est un jugement final dont il y a appel *de plano* devant trois juges de la Cour Supérieure siégeant en Révision ;

2o. Que dans l'espèce la nomination du séquestre n'aurait pas dû être ordonnée.

LE JUGE TESSIER :—Il s'agit d'un séquestre judiciaire.

Les Appelants McCraken ont porté contre l'Intimé James Logue une action pétitoire accompagnée d'une saisie conservatoire des bois coupés sur les immeubles revendiqués. Le défendeur a donné un cautionnement pour retenir la possession du bois saisi. Après le rapport de l'action, le 11 janvier 1883, les demandeurs ont demandé au juge en Chambre pour le district d'Ottawa la nomination d'un séquestre pour séquestrer les immeubles et tout ce qui se trouvait dessus. Ce séquestre a été ainsi nommé. L'Intimé a inscrit en révision et, le 10 mars 1883, la Cour Supérieure à Montréal a mis de côté le séquestre. C'est de ce jugement qu'il y a appel devant cette Cour.

Il s'élève une question de procédure et une question au mérite du séquestre.

Sur la question de procédure on objecte qu'il n'y a pas droit d'appel, *de plano*, qu'il eût fallu faire réviser cette ordonnance de séquestre en Chambre par la Cour Supérieure siégeant *in banco* et que l'ordonnance du juge devenant ainsi un jugement de la Cour Supérieure, il y avait lieu à appel comme de tout autre jugement de la Cour Supérieure. La majorité de cette Cour ne décide pas que si la procédure eût eu lieu de cette manière, que cette procédure eût été illégale. Cette Cour est appelée à décider si la procédure qui a eu lieu

est illégale ou non. L'ordonnance de séquestre prononcée en cette cause n'est pas de la nature d'un jugement interlocutoire, on peut même demander un séquestre après le jugement final en cas de saisie, mais c'est une procédure sommaire, distincte et séparée, comme d'un jugement final sur la matière, sur le sujet particulier qu'elle décide et adjuge. A raison de cela cette ordonnance a pu être révisée par la Cour Supérieure composée de trois juges. Pourquoi cette révision par trois juges ne serait-elle pas aussi légale que celle de la Cour Supérieure présidée par un seul juge ? C'est toujours la même Cour Supérieure.

Par analogie, l'article 1340 du Code de Procédure, qui soumet la décision du tribunal ou du juge à la révision de trois juges de la Cour Supérieure dans des matières qui n'ont pas plus d'importance que celle-ci, me paraît justifier la juridiction de la Cour Supérieure en révision dans la présente affaire.

Sur la question au mérite, les demandeurs McCraken allèguent une licence de coupe de bois sur ces terres et d'arbres, mais allèguent qu'avant l'action, dès 1879, le gouvernement a refusé de leur renouveler cette licence sur les terres en question et a accordé au défendeur et à ses auteurs des billets de location ou occupation suivis de lettres patentes de la couronne. Les demandeurs allèguent que ces lettres patentes ont été émanées sur de fausses représentations du défendeur et ils en demandent la nullité sans que la couronne soit en cause.

Ces allégations des Demandeurs suffisent pour les priver d'un droit à un séquestre. Ils n'ont d'après eux-mêmes, ni titre ni possession, c'est au contraire le Défendeur Intimé qui a le titre apparent et la possession publique. Ce n'est pas justifiable en pareil cas de priver le Défendeur de ses terres, bâtisses, bois et de ses améliorations. Cette Cour est donc venue à la conclusion de confirmer le jugement de la Cour de révision rendu le 10 mars 1883, aux dépens de cet appel contre les Appelants suivant la teneur du dit jugement, qui est comme suit:

The Court now sitting as a Court of Review having heard the parties upon the merits of this cause and upon the inscriptions by Defendant for the revision of the judgments rendered in Chambers by the Hon. Mr. Justice McDougall,

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namely by one inscription of the judgment rendered on the eleventh day of January 1883, ordering the appoinment of a Sequestrator, and of the judgment of the nineteenth day of said month of January appointing said Sequestrator, and by the other inscription of the judgment rendered on the nineteenth day of January, 1883, rejecting the Defendant's petition praying leave to give security, having examined the proceedings and the whole record and deliberated :

Considering that it appears from the procedure of record that Defendant has been under Letters Patent from the Crown since 17th January 1882 in possession as proprietor of the lots of land from which the timber seized was cut;

Considering that under the provisions of 32 Vict. Chap. 11, (1869) of the Statutes of Quebec it is questionable whether the title of Defendant could be called in question otherwise than by the grantor of said Letters Patent, namely by the Crown which is not a party to this suit :

Considering that under the circumstances, the petition for sequestration prayed for by Plaintiffs of date the twenty-sixth November 1882 should not be granted :

Doth revise said judgment of date the eleventh day of January 1883 ordering said sequestrator to be named, and the judgment of date the nineteenth day of January 1883 naming such sequestrator, and doth dismiss said petition of date twenty-sixth November for sequestration with costs to Defendant.

And considering that Defendant's petition of date fifteenth January 1883 praying that he be allowed to give security to the amount of four thousand dollars interest and costs should have been granted;

Doth maintain the inscription in Review against the judgment of date the 19th day of January 1883 rejecting Defendant's petition,—doth grant the said petition, and doth in consequence order that the said Defendant petitioner do retain possession of the lots of ground in question and of the timber thereof upon giving good and sufficient security according to law for the balance not yet secured of the value of the said timber as estimated by the said Plaintiffs, to-wit for the sum of four thousand dollars currency and interest and costs which may be awarded by judgments to be rendered it in this cause;

And the Court doth condemn the Plaintiffs to pay the costs in review on the petition to have a sequestrator named and appointed, the inscription on second petition for security going without costs and doth also adjudge that costs of Court below be reserved, save as to the petition dismissed. McCraken & Logue

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Dorion, C. J., *dissentiente* :—The Appellants claiming to be entitled to certain rights under a license for cutting timber on certain lots of land possessed by the Respondent instituted an *action pétitoire* against the latter. On the return day of this action, the Appellants presented a petition and obtained an order from a judge in Chambers, for the appointment of a sequestrator to the lots claimed by them.

On the 18th of the same month, the Respondent moved to be permitted to retain possession of the lands claimed upon giving security. This motion was rejected and a sequestrator was appointed. Respondent then inscribed the case for review before three judges, in the Superior Court.

The Court of Review reversing the orders made by the judge of the Court below dismissed the petition of the Appellants for the appointment of a sequestrator and ordered that the Respondent do retain possession of the said lands on his giving security to the amount of $4,000.

The present appeal is from this judgment and raises two questions: 1st, were the orders given by the judge of the Court below final judgments of which the Court of Review could take cognizance? and 2nd, were these judgments or orders rightly set aside by the Court of Review?

On the first question I consider that an order on a petition to appoint or to dismiss a sequestrator, or to obtain pending the suit, upon giving security, possession of the property, which is the subject of the litigation, are mere provisional orders which can in all cases be varied or set aside by the Court or judge which pronounced them. They cannot therefore in any sense be considered as final judgments, and as the Court of Revision can only take cognizance of final judgments, I consider that it had no jurisdiction to enquire into the validity of the rulings of the judge *a quo*. The appeal should have been carried to this Court, as from interlocutory judgments and not taken to Review.

Pigeau, vol. 1, page 387, says: "Les jugements interlocu-

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" toires sont de deux sortes, *préparatoires et provisoires. Les* " *provisoires* sont ceux par lesquels les juges, voyant que la " contestation pourra être longtemps à se décider et que sa " durée pourrait produire des inconvénients, y obvient en " ordonnant ce qu'exigent d'eux les circonstances. Il y a cinq " cas principaux où ils prononcent ces jugements.

" Le premier quand l'affaire requiert célérité.... Tel est " celui où un homme contre qui l'on réclame un bien, le " dégrade, on ordonne le sequestre de ce bien en attendant " la décision de la contestation."

At page 388, the writer gives the form of an order appointing a sequestrator, which begins as follows:

" Nous, par provision, ordonnons que les biens dont est " question seront régis et gouvernés par un séquestre."

Pothier, Procédure civile, No. 305, § 2, says:

" Si le séquestre n'a pas été demandé par l'exploit, *cet inci-* " *dent* se forme par une requête que présente au juge la " partie qui demande le séquestre."

The same, No. 307: "Si l'une des parties conteste la sol- " vabilité du séquestre, il faut se pourvoir à l'audience pour " faire statuer *sur cet incident* et faire nommer un autre " séquestre s'il y a lieu."

Guyot, Répertoire, vo. sequestre, p. 243, says:

" A cet effet celle des parties qui a intérêt de demander le " séquestre des fruits pendant la contestation présente une " *requête incidente.*"

These authorities show clearly that a proceeding for the appointment of a séquestre is a mere incidental proceeding in the case and that the judgment ordering the appointment of a sequestre is a mere interlocutory order which under art. 494, C. C. P., as amended by the 34 Vic. C. 4, cannot be taken in Review, Foran, p. 267.

The Court of Review has however decided in the case of *The Hereditable Securities & Mortgage Association* vs. *Racine* (2 Legal News, p. 325) that it had a right to revise a judgment rendered by a judge in Chambers cancelling the appointment of a séquestre made by another judge in Chambers. This judgment was rendered by a bare majority and is directly opposed to the case of Blanchard & al. vs. Millar (16, L. C. J., 80) in which this Court held, in 1872, that an

appeal does not lie from a judgment or order of a judge given in vacation appointing a séquestre.

On the 2nd question, I am entirely of the opinion of the Court of Review. There was not a shadow of a ground for the appointment of a séquestre in this case, especially when the Respondent was offering to give ample security. The Appellants did not even allege in their declaration that they had a title to the property. They merely pretended that the letters patent granted by the Crown to the Defendant were obtained by fraud and that if these letters patent had not been evaded, they would have been entitled to a license for cutting timber upon the property in question. On the merits the correctness of the judgment in Review cannot be doubted, and were it not that I am afraid that the decision on the 1st point will lead to endless litigation, as to what judgments are to be considered as final judgments coming within the jurisdiction of the Court of Review, I would not have expressed a dissent in this case. I cannot, however, consider that an order for the appointment of a séquestre can be considered as a final judgment and though recluctantly I am obliged to dissent from the judgment about to be rendered.

Jugement confirmé.

T. P. Foran, for Appellant.

L. N. Champagne, for Respondent.

MONTRÉAL, 22 MAI 1883.

Coram DORION, juge en chef; MONK, TESSIER, CROSS, BABY, J. J.

No. 427.

BOYD,

Demandeur en Cour Inférieure,

APPELANT;

&

WILSON & AL,

Défendeurs en Cour Inférieure,

INTIMÉS.

JUGÉ:—Que dans l'espèce la bouilloire et les mécanismes de la fromagerie dont il est question, sont choses mobilières et qu'elles appartiennent à celui qui a le titre le plus ancien et la possession.

DORION, C. J., (*dissentiente*).—This appeal is from a judgment dismissing a saisie revendication made by the Appellant (Plaintiff in the Court below) of certain machinery found in the possession of the Respondents. The facts which gave

rise to the contestation are as follows. Thomas Bryson leased from one John Cullen, for a term of nine years, a lot of land on which he had built a cheese factory. It was covenanted in the lease that, at the expiration of the lease, Bryson would have the right to remove the buildings by him erected. The lease was registered on the 25th August 1875. Bryson sold his right to the lease and the cheese factory and machinery therein to one David Strachan subject to a right of redemption. David Strachan transferred his rights to James Strachan, and the latter to Respondents and to one Frank Wilson. None of these conveyances were registered.

On the 30th November 1876, Bryson transferred the unexpired term of his lease, together with the cheese factory, steam engine and other machinery to one Andrew Cook, who transferred his rights to the Appellant. These two transfers were duly registered.

The transfer to Cook was also subject to a right of redemption for nine months. Bryson all the time remained in possession of the factory and machinery, and failed to exercise the rights of redemption (*reméré*), which he had stipulated both in the transfer made to Strachan and that made to Cook, the Appellant's *auteur*. The Respondents removed a steam engine and other machinery which were in the factory at the time. The Appellant claiming to be the owner of this property by virtue of the transfer by Bryson to Cook and by Cook to himself, took out a saisie-revendication. This seizure has been contested by the Respondents, on the ground that prior to the transfer to Cook, the *auteur* of the Appellant, the articles seized have been transferred to David Strachan whom they represented.

There is no difficulty as to the seizure of the steam engine. It was put in the building by Bryson, after he had transferred his rights to Strachan, and the saisie revendication has been maintained as regards the said engine, but dismissed as to the other articles, seized.

The Court below has in effect declared that the building erected by Bryson for a cheese factory was an immoveable property and yet held that the machinery in use in this factory, were but moveables, and that the sale to Strachan, the *auteur* of the Respondents, was valid.

It is difficult to see how a building put up by a tenant who

has the right to remove it can be considered as an immoveable property, independently from the soil on which it stands, and how the machinery incorporated in the said building can be considered as mere chattel property; it seems that if the one is to be considered as immoveable property, the other forming part of it should also be considered as immoveable property (art. 379 C. C.) But it is on other grounds that I consider that this judgment is assailable.

The original lease to Bryson was a lease of a lot of land for a period of nine years. Under the law which prevailed before the abolition of the seigneurial tenure, such a lease was considered as a transfer of real rights and subjected the tenant to the payment of *lots* et *ventes* or commutation fines.

Under the assumption that such a lease contained a transfer of a realty, the special Council by the Registry ordinance, 3 & 4 Vic., ch. 30, sec. 17, expressly exempted from registration all leases for a term less than nine years, and by necessary implication directed that all leases for a period of nine years or more, should be registered. The Civil Code, art. 2128, has extended this provision to leases for a period exceeding one year. It therefore follows that the lease of real estate for a period exceeding one year cannot be invoked against a subsequent purchaser, unless it has been registered before the title of that subsequent purchaser has been registered.

Cook, the *auteur* of the Appellant, and the Appellant himself are purchasers of the rights of Bryson by deeds subsequent in date to the transfers by which the Respondents and their auteurs have acquired the rights of Bryson, but there is this difference: the Appellant and Cook, his *auteur* have registered their transfers while the Respondents and their auteurs have failed to enregister theirs. What has been sold by Bryson to the auteurs of the Appellant, as well as to the *auteurs* of the Respondents is not merely a building and certain specific pieces of machinery, but it is the unexpired term of a lease for nine years of a lot of land upon which a factory had been erected and machinery placed to work this factory. The Respondents cannot claim that they have purchased this machinery apart of the building and from the unexpired term of the lease. They cannot say that although they have no right to the lease and to the building, yet they

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can remove the machinery in said building, as if they had purchased them as independent chattel property. They have purchased the rights of Bryson as a whole (1). These rights as a whole constituted real rights subject to registration and the Appellant, whose *auteur* subsequently purchased the same rights from Bryson, the same vendor, and who has registered his transfer is to be preferred to the Respondents who neither registered their title, nor had possession of the factory. The saisie revendication made by the Appellant should have been maintained, as to the whole machinery removed by the Respondents and which formed part of the building erected by Bryson. I would therefore have declared that the Respondents, whose title was not registered, could not claim the machinery seized as against the Appellant who had duly registered his title and I would have maintained the saisie revendication as to all the articles seized.

TESSIER, juge :— L'Appelant Boyd réclame par saisie revendication la propriété d'un engin et d'une bouilloire et autres mécanismes propres à une fabrique de fromage.

L'engin lui a été accordé, la contestation existe sur la ouilloire et autres mécanismes incidents d'une fromagerie, que le jugement de la Cour Supérieure lui a déniés. De là l'appel.

Le 16 août 1875, John Cullen donna un bail écrit pour 9 ans d'un terrain à Thomas Bryson, pour permettre à celui-ci d'y construire une fabrique de fromage, mais avec le privilège à Bryson d'enlever toute construction à la fin du bail.

Bryson a construit cette fabrique de fromage, mais il a vendu à deux personnes différentes la bouilloire et les mécanismes, de là la contestation entre ces deux acquéreurs. En 1875 il a vendu ce mécanisme à Strachan qui l'a cédé à Wilson, l'Intimé en cette cause, qui, considérant ce mécanisme comme chose mobilière, n'a pas fait enrégistrer son acte d'achat, tandis qu'un an après, en 1876, le même Bryson a

(1) Journal du Palais, 1847—179—" Pour que les agrès et ustensiles attachés à une usine et devenus immeubles par distinction reprennent leur qualité de meubles, il est nécessaire que ces agrès et ustensiles soient détachés sans fraude de l'immeuble, et réellement vendus séparément. "

vendu le même mécanisme à Cook qui l'a cédé à Boyd, l'Appelant. Boyd considérant ce mécanisme comme immeuble a fait enregistrer son titre et par son droit de préférence à cause de l'enrégistrement, il a fait saisir les mécanismes en question. De là la contestation entre les deux parties. Si ce mécanisme est un immeuble en loi, l'Appelant Boyd, par sa priorité d'enrégistrement devrait réussir ; si c'est chose mobilière il n'y a pas besoin d'enrégistrement, et Boyd ayant le titre le plus ancien et la possession de la chose devrait réussir. C'est dans ce dernier sens que la Cour Inférieure a décidé, et il s'agit de savoir, si ce jugement est correct ou non.

Dans l'application des articles de notre Code, pour distinguer ce qui peut être ou devenir immeuble par destination, il faut bien remarquer ces deux conditions, 1° que la construction soit faite par le propriétaire du sol.

2° Que cette construction soit à perpétuelle demeure.

Ce sont là les deux conditions de l'article 379 de notre Code sur la matière.

Au contraire l'article 384 dit "généralement toutes usines "non fixées par des piliers et ne fesant pas partie du fonds "sont meubles."

Appliquant ces règles aux faits prouvés en la présente cause, il est clairement établi que ces mécanismes n'ont pas été placés là à perpétuelle demeure, puisqu'il est stipulé dans le bail qu'ils pourront être enlevés à la fin du bail au bout de 9 ans.

En second lieu ils n'ont pas été placés là par le propriétaire, mais par un locataire qui n'a pu ni voulu les incorporer au fonds.

Hennequin, Traité de Législation 1, p. 5. "Les fonds de "terre sont les seuls immeubles qui tiennent leur immutabilité de leur nature même. Les édifices ne deviennent et "ne demeurent immeubles que par incorporation au sol; et "encore faut-il que l'incorporation ait eu lieu à perpétuelle "demeure. S'il résulte des circonstances ou s'il est établi par "*une stipulation contractuelle*, que dans la pensée, dans l'intention du constructeur, l'union ne doit être que temporaire, les matériaux employés dans la bâtisse restent chose "mobiliaire. C'est ainsi qu'il a été jugé que des constructions faites par un fermier avec la réserve consentie par le

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" propriétaire de démolir à l'expiration du bail ne produisent " aucuns de ces effets de l'immobilisation."

Rolland de Villargues, vol. 6, Nos. 57 et 58 dit : " Remar- " quez comme conséquence de ce qui précède que les mou- " lins, usines, etc., n'étant immeubles qu'en vertu du prin- " cipe, quod solo inædificatum est solo cedit, ou par le droit " d'accession, les parties peuvent par des stipulations formelles " déroger aux effets de cette détermination de la loi."

4 Duranton, No. 48.

2 Marcadé, p. 343.

Demolombe, vol. 9, p. 163, No. 283 dit : " Et d'abord il " nous paraît certain que le seul fait qu'un meuble serait " matériellement attaché au fonds, soit à fer ou à clou, soit " même à chaux ou à ciment, que ce seul fait, disons-nous, " par lui-même et par lui seul ne suffirait pas pour immobi- " liser ce meuble, si l'on n'y reconnaissait pas le placement " à perpétuelle demeure et la destination, c'est-à-dire l'inten- " tion du propriétaire d'en faire un accessoire permanent de " l'immeuble."

Dem., vol. 9, p. 173, No. 298.

Si l'on applique la preuve des faits à ces principes bien émis, il est établi que cette bâtisse est temporaire ; encore plus les mécanismes qui s'y trouvent, le témoin George Rousseau, architecte, 1ère page de l'appendice de l'Intimé, jure : "The building is of a temporary character. It is not " attached to the ground by a foundation, but sits on wooden " blocks. There are no pins, nor bolts nor spikes......

" It could be removed just as it is now without any " trouble at all.... The building stands three feet above the " ground, you can see from one end to the other through " underneath, I went under it myself.

" The boiler or engine house is not attached to the main " building where the machinery was situated."

La majorité de cette Cour conclut donc à confirmer le jugement avec dépens.

Jugement confirmé.

MacLaren & *Leet*, *for* Appellant.

Archibald & *McCormick*, *for* Respondents.

MONTREAL, MARCH, 24th. 1883.

Coram DORION, C. J. MONK, RAMSAY, CROSS & BABY, J. J.

No. 431

ALEXANDER MOLSON,

Defendant in the Court below,

APPELLANT;

&

J. T. CARTER,

Plaintiff in the Court below,

RESPONDENT;

Nos. 432 & 433.

DAME E. A. HOLMES, *ès qualité* & AL.,

Defendants in the Court below,

APPELLANTS;

&

J. T. CARTER,

Plaintiff in the Court below,

RESPONDENT.

By his last will, the late Hon. John Molson, after making several special legacies, bequeathed the remainder of his estate comprising immoveable property and bank stock to his five sons, of whom the Appellant is one, subject to a substitution in favour of their children and to the express condition that the revenue of said property and bank stock should be ***inaliénable*** and ***insaisissable***, with power to two of the Executors, of whom Wm. Molson, brother of the testator, should be one, to sell any portion of the said immoveable property, if they deemed it advantageous or necessary. Wm. Molson and the Appellant, being two of the Executors, transferred to the Appellant, in his individual name, a fifth part of the bank stock, and certain immoveable property belonging to the estate. The transfer of the bank-stock was made a few days before the day on which a division of the residue of the estate took place, and the sale of real estate, on the day of the division or partage ; the object of these transactions being to release this property from the substitution and from the conditions of *inaliénabilité* and *insaisissabilité* to which it was subject by the will.

HELD : 1o. That the sale of immoveable property by the two executors to one of them must be considered as made by one Executor only, and was not authorised by the will.

2o. That such immoveable property must be considered to have passed to the Appellant, as a portion of his share in his father's estate, and subject to all the conditions of his will, and that the rents of such pro- property cannot be seized at the suit of the Appellant's creditors.

3o. That the dividends of the bank-stock now held by the Appellant can be attached by his creditors, this bank-stock not being the same that was bequeathed to him by his late father, is not subject to the condition of *insaisissabilité* mentioned in the will.

Alex Molson & J. T. Carter.

Dame Holmes & J. T. Carter.

DORION, C. J.—The Respondent (plaintiff in the Court below) having obtained a judgment against the Appellant has attached by means of a writ of *saisie arrêt*, the rents of a house in St. James street, of this city, leased by the Appellant to one Allan Freeman, and also the dividends on one hundred and forty-eight shares of the Molson's Bank stock.

The Appellant has contested this attachment, on the ground, that the house and its rents, as well as the Bank stock the dividends whereof have been attached, had been bequeathed to him by his father, the late John Molson, *à titre d'aliments* and on condition that neither the property nor their income should be seized or alienated.

The Court below dismissed the contestation and maintained the attachment.

The appeal is from this judgment.

The questions at issue are 1° whether or not the rents of the house and the dividends of Bank stock attached were bequeathed to the Appellant *à titre d'aliments* and on the condition they should neither be seized, nor alienated, and 2° what is the effect of such a condition as regards the creditors of the legatee.

Mr. Molson, the father of the Appellant, made his will on the 20th day of April 1860, and died shortly after, leaving considerable property.

The clauses of the will which are material to this case are the 10th which defines the powers of the executors, the 13th which names the five sons of the testator his universal residuary legatees; the 16th which relates to the division of the residue between the five universal legatees, and the 18th. which provides that the rents, issues and profits of the share of each of these legatees shall be treated as a *legs d'alimens* and be *inaliénables* and *insaisissables*. These clauses read as follows:

Tenthly,—" And as to the residue of my estate, real and " personal, wheresoever the same may be, and of what" soever the same may consist, of which I may die possessed, " or to which I may then be entitled, I give, devise and be" queath the same to my said brother William Molson, of the " said city of Montreal, Esquire, Mary Ann Elizabeth Molson, " my beloved wife, and Alexander Molson, my youngest son " now living, the survivors and survivor of them, and the

" heirs and assigns of the survivor of them, upon the several " trusts hereinafter declared, that is to say, upon trust: " Firstly, to hold, administer and manage the said residue " of my estate to the best advantage during the full term of " ten years from and after the day of my decease, and " further, if my said wife be living at the expiration of that " term and shall have acceded to the condition expressed in " the sixth section of this my will, until the expiration of " one year from and after her decease.—Secondly—To sell " and convey all such parts of my real estate as are not " herein before specifically devised and as they shall deem " it advantageous to my estate to sell, and to grant deeds of " sale and conveyance of the same, to receive and grant " receipts for the purchase monies, to invest the purchase " monies, and all other monies arising from or accruing to " my estate, and not already invested, on good and sufficient " security either by way of hypothèque or mortgage of or " on real estate or by the purchase of government stocks, or " stocks of sound incorporated banks, so as to produce in- " terest, dividends, or profits, to secure the regular payment " of the annuity payable to my said wife under her said " marriage contract, and the additonal annuity hereinbefore " bequeathed to her, and generally to comply with and fulfil " all other the requirements of this my will; and, thirdly, " at or so soon as practicable after the expiration of the term " of the said trust to account for and give up the said residue, " as the same shall then be found, to my residuary devisees " and legatees hereinafter named; in all questions touching " the sale and disposition of any part of my estate, or the " investment of monies arising from my estate or accruing " thereto, the concurrence of any two of my said trustees, of " whom, while living, my said brother William Molson " shall be one, shall be sufficient.

Thirteenthly.—" I further will and direct that at the ex- " piration of the term hereinbefore limited for the con- " tinuance of the said trusts, the said residue of my estate, " real and personal as the same shall subsist, shall under " and subject to the conditions and limitations hereinafter " expressed, fall to and become and be, for their respective " lives only, and in equal shares the property of my said " five sons and at the death of each of my said sons, or if

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" any of them shall have died before the expiration of the " said term, the share of the one so dying or who shall have " died, shall become and be forever the property of his " lawful issue, in the proportion of one share to each " daughther and two shares to each son, subject however to " the right of usufruct thereof on the part of his widow, if " living, for so long only as she shall remain his widow. It " is my will however that it shall be, and I hereby declare " it to be competent to each of my said five sons by his last " will and testament or by a Codicil or Codicils thereto, but " not otherwise, to alter the proportions in which by the " foregoing bequest and devise a share of the residue of my " estate is bequeathed and devised to his lawful issue, and " even to will and direct that one or more of his said lawful " issue shall not be entitled to any part or portion of the " said share of the residue of my estate, anything herein con- " tained to the contrary notwithstanding.

Sixteenthly.—" And I further will and direct that as soon " as it may be practicable after the expiration of the term " hereinbefore limited for the continuance of the said Trust, " the said Trustees shall apportion and distribute the said " residue of my estate to and among the parties entitled " thereto, as hereinbefore directed, taking care in such ap- " portionment and distribution, to provide, (so far as may be " possible and in such manner as the said Trustees may " deem best), as well against risk of the capital of any of the " shares being lost in the hands of any holder thereof under " substitution or as usufructuary thereof as against risk by " reason of my said engagements under the marriage con- " tracts above referred to, of my sons John and Alexander, " and if in making the apportionment and division of the " said residue the said trustees shall deem it necessary or " advantageous to sell any part of the said residue, and in " lieu thereof to apportion and divide the net proceeds of the " sales thereof, it shall be competent for them so to do any- " thing hereinbefore to the contrary notwithstanding.

Eighteenthly.—It is further my express will, and I hereby " specially direct and ordain as an essential condition of my " bequests aforesaid in favor of my said five sons and of " their widows respectively, that all the estate, interest and " property, whether by way of usufruct, annuity, or other-

" wise, and every part and portion thereof, which my said " sons respectively or their widows respectively shall or " may in any wise take or receive, or be entitled to take or " receive under this my will, and also all interest or reve- " nues, or income in any wise to arise therefrom, shall be " and remain forever exempt from all liability for the debts " present or future, of them or any of them and shall be " absolutely *insaisissables*, for any such debts or for any " other cause whatsoever, and shall be, and shall be held " and taken as being, to all intents and purposes, *legs d'ali-* " *mens* by me hereby made and granted in favor of them and " of each of them, and shall moreover be insusceptible of " being by them, any or either of them, assigned or other- " wise aliened for any purpose or cause whatsoever."

On the 25th of March 1871, a statement of the assets of the estate was prepared in order to convey to each legatee his share, and by this statement, it appears that the estate was then possessed of 3,200 shares of the Molson's Bank stock, valued at $160,000, and of three stores, in St. James street of this city, valued at $90,545.75. On the 5th of April 1871, William Molson and the Appellant, in their capacity of Trustees, transferred to the Appellant, individually, six hundred and forty shares of the Molson's Bank stock, this being exactly the number of shares to which the Appellant was entitled to as one of the five universal legatees of his late father.

On the 15th of June following, the two trustees William Molson and the Appellant conveyed to the Appellant, in his own individual name, by a deed purporting to be a deed of sale, one of the stores in St. James street, for the price of $30,779.52, which sum they acknowledged had been included in the share of the Appellant in the distribution of the estate of the late John Molson and the Appellant was discharged from the payment thereof towards the estate On the same day they conveyed to the Appellant, as legatee under his father's will, his share of the estate including in that share the price of the St. James street store and of the 640 shares of Molson's Bank stock.

The 640 shares of the Molson's Bank stock have all been sold by the Appellant and others purchased by him from time to time, to the extent of one hundred and forty-eight shares, which are entered in the stock book of the Bank, as

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held by the Appellant in trust for E. A. M. & al. It is the dividends of these shares and the rent of the store conveyed to the Appellant by the deed of the 15th of June 1871, that have been attached by the Respondent.

From the evidence, it appears that the Appellant neither paid for the 640 shares of Molson's Bank stock, which have been transferred to him on the 5th of April 1871, nor for the store which was deeded to him on the 15th of June 1871.

These transactions were made for the purpose of relieving from the effect of the substitution created by Mr. Molson's will, both the Molsons Bank stock and the St. James street property, which by a proposed division of the estate were to have fallen in the share of the Appellant. This appears by the answers of the Respondent to Appellant's contestation, by Mr. Abbott's evidence, p. 66 of Appellant's factum and by the schedules Nos. 1 et 2 annexed to the deed of the 15th of April 1871 by which the Trustees conveyed to the Appellant his share of the estate of his late father. These schedules containing a statement of the property of the estate to be divided among the legatees and of the share to be apportioned to the Appellant are admitted by the deed itself to have been prepared on or before the 25th of march 1871, so that although the deed of conveyance to the Appellant was only passed on the 15th of June 1871, the division of the estate had really been prepared and the lots ascertained as far back as the 25th of March preceding.

The Respondent contends that the Trustees had the right to make these transactions under the terms of the will, which authorised any two of the Trustees, one of whom should be Mr. William Molson, to sell the testator's real estate, if they deemed it advantageous, (clause 13) and also to apportion and distribute the residue of this estate to and among the parties entitled thereto, and if they deemed it necessary to sell any part of such residue and to apportion and divide the net proceeds in lieu thereof. (Clause 14).

This power of sale could only apply to *bona fide* sales made in the interest of the estate and with a view to promote the intentions of the testator; but the Appellant as one of the Trustees was not authorised to join another Trustee to sell to himself individually any portion of the property bequeathed to him, with the avowed object of defeating the

provisions of the testator's will. The sale was therefore made by one trustee alone to another trustee contrary to the provision of the will; yet Mr. William Molson could in that capacity convey to the Appellant, as one of the legatees his share in the residue of the estate, as was done by the deed of division or apportionment of the 15th of June 1871, bearing the number 3258. The deed of sale of the St. James street property passed on the same day under the No. 3259, as well, as the transfer of the 640 shares of Molson's Bank stock made on the 5th of April 1871, must then be considered as forming part of the division of the assets of the testator's estate, although the conveyance was made in another form—and not by a deed of partition.

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"Every act (says art. 747 of the Civil Code) having for its "object to put an end to indivision amongst co-heirs and "legatees is deemed to be a partition, although it purports "to be a sale, an exchange, a transaction, or have received "any other name."

The 640 shares in the Molson's Bank stock and the St. James street property must therefore be deemed to have been conveyed to the Appellant in his capacity of legatee *grevé de substitution* and subject to the conditions of *insaisissabilité* and *inaliénabilité* contained in the will.

The evidence shows that the Appellant has disposed of the 640 shares of the Molson's Bank stock since they have been conveyed to him and that none of the 148 shares now, standing in his name, as trustee for E. A. M. et al., form part of the original 640 shares which he received from his father's estate. There is therefore no identity in the shares, and there is no proof that these 148 shares were purchased with the proceeds of the 640 original shares.

No subrogation has taken place of the one for the others, and, as regards third parties, the conditions of the will do not attach to these 148 shares, whatever rights the appelés might exercise over them, as against the Appellant and his heirs.

That portion of the Appellant's contestation that these 148 shares could not be seized by his creditors was therefore rightly dismissed by the Court below.

The St. James street property is in a different position, for

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it is still in the possession of the Appellant and subject to the conditions attached to the bequest.

As the contestation has only reference to the rents of this property, we have nothing to do with the substitution created in favour of the Appellant's children, nor with the usufruct reserved to his wife. These affect the property itself and not the income—whether these contingent rights (*droits éventuels*) have been preserved by a proper registration of the will, or lost from the want of it, is not a question in this case. This point will only come up on the death of the Appellant or when the property is seized and it will have to be raised as against the wife and children of the Appellant, who alone are the parties interested in claiming this usufruct and substitution.

The only question we have to deal with in this case is whether the rents and revenues of this property, which rents and revenues belong to the Appellant as long as he remains in possession of the property, can be seized by his creditors.

Article 558, § 3 & 4 of the Civil Code exempts from seizure "sums of money or objects given or bequeathed upon the "condition of their being exempt from seizure."

"Sums of money or pensions given as *aliment* even though "the donor has not expressly declared that they should be "exempt from seizure."

This article is not new law and must be interpreted according to the rules and jurisprudence existing when the code was enacted.

Pigeau, vol. 1, p. 612, (Ed. 1779) says: "Les choses insaisissables par le titre de propriété, sont celles qui ont été "données ou léguées au débiteur à condition de ne pouvoir "être saisies; un donateur peut apposer à sa libéralité telles "conditions que bon lui semble, pourvu qu'elles ne blessent "pas les bonnes mœurs, ni l'intérêt d'un tiers. Cette clause "n'y porte aucune atteinte; je prévois qu'un de mes parents "accablé de dettes, ou par son inconduite, tombera dans la "misère, je lui donne des meubles à condition qu'ils ne "pourront être saisis, je ne fais aucun tort à ses créanciers."

Pothier, Proc. Civile, No. 501 (Ed. Bugnet), says: "Les "revenus des biens qui ont été donnés, ou légués, à la charge "de n'être susceptibles d'aucune *saisie-arrêt* n'en sont pas

"susceptibles; car il est permis au donateur ou testateur "d'apposer telle condition que bon lui semble à sa libéralité; "c'est ce qui a été jugé par arrêt du 29 novembre 1734, "qui a donné main levée des *saisies arrêts* d'un usufruit "légué par un parent collatéral, à la charge de ne pouvoir "être saisi."

Denisart, No. 23, cites the same arrêt.

There can be no doubt that a party entitled to a legacy made on the condition that it shall not be liable to be seized by his creditors, has the right to oppose, in his own name, the seizure of such legacy or of its income, in the same manner that he would be entitled to oppose the seizure of any of the objects mentioned in articles 556, 557 and 558, C. C., such as his bed, bedding and bed-steads and those of his family, their ordinary and necessary wearing apparel; books of account, etc..., consecrated vessels and things used for public worship, etc., which are all placed on the same footing, as regards their exemption from seizure.

The Court below owing no doubt to an error in the answers to the articulation of facts has considered that the will had not been duly registered (although a copy of this will was in the record bearing the ordinary certificate of registration given by the registrar) and that from the absence of such registration, the substitution was effete. It also held that the Appellant having hypothecated the property to the Respondent and declared that he was the true and lawful owner of it, he was not now entitled to claim, as against the Respondent, that it formed part of the property substituted and was subject to the conditions of *insaisissabilité* and *inaliénabilité* mentioned in his father's will.

We have already said that the question of the validity of the substitution does not arise in this case. The rights accruing by virtue of the substitution belong to the children of the Appellant. They are the *appelés* and as such entitled to claim after the death of their father the fee simple of the property of which the life interest has been bequeathed to him. The substitution affects the property only and not the income accruing during the lifetime of the Appellant. He has no personal interest in the substitution and whether it still subsist or has been lost from want of proper registration, is a matter of perfect indifference in deciding the present

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contestation. It is the same with regard to the hypothec of the Respondent; it only affects the property and not the income, and as long as the property remains in the possession of the Appellant, a mere hypothecary creditor of the Appellant has no privilege whatsoever on the rents of such property; quoad those rents he has no more rights than a mere ordinary or chirography creditor. There is no provision of law requiring that a declaration by a testator that the property bequeathed by him shall be *insaisissable* shall be registered in order to preserve its effects. If therefore an ordinary creditor could not claim to be paid out of those rents, the Respondent altho an hypothecary creditor has no greater right.

There remains the last objection that the Appellant having hypothecated the property and declared that it belonged to him by purchase, is estopped from claiming now that it is *insaisissable* under his father's will. We have already answered this objection by showing that the hypothec merely affected the property and not the rents. Under our system there can be no hypothec on chattel property, and the Appellant could not hypothecate those rents. In addition to this, the contention of the Respondent would only be entitled to consideration, if the Appellant was in this matter claiming a right of his own, instead of claiming a right derived from his father's will. He is acting, as it were, as a trustee asking that the intentions of the testator be carried out.

It will not be denied that during the ten years that the trustees were in possession of the estate, or that if trustees had been appointed by the testator to see to the execution of the conditions of his will after a division of the property had taken place between the legatees, that such trustees would have had the right to oppose the seizure of these rents as being contrary to the dispositions made by the testator; no fraud of the Appellant could have deprived such trustees of the right to see that these rents be not diverted to other purposes than those contemplated by the testator. If the Appellant has committed any fraud to the prejudice of the Respondent, he is no doubt responsible in damages. These damages may be recovered on all other property which the Appellant may have, but not upon that which has been

given to him on the express condition that it should not be seized by his creditors.

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These rules of our law are tersely expressed in the collection known as nouveau Denisart, Vo., défense d'aliéner, § 2, No. 1. "La défense d'aliéner, insérée dans une donation " ou legs d'une rente viagère, ou *usufruit viager*, sur la tête " du donataire, est une présomption que l'intention du dona- " teur a été de donner la rente pour alimens. En consé- " quence c'est une clause d'une nature particulière, apposée, " non pour grever le donataire, mais en sa faveur. Elle n'est " jamais considérée comme simple conseil, elle est toujours " une clause impérieuse, qui rend radicalement nulle toute " aliénation de la rente que le donataire pourrait faire. Si, " malgré la défense, le donataire vient à la vendre, *il pourra* " *y entrer quand bon lui semblera*, et l'acquéreur aura seule- " ment contre lui une action en restitution du prix qu'il en " a donné sans pouvoir retenir jusqu'à due concurrence les " arrérages à écheoir, etc."

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This shows conclusively that the donees and legatees have the same right to claim the execution of the conditions of the will, relating to the *insaisissabilité* and *inaliénabilité* of the property bequeathed, that the testator himself or a Trustee would have.

For the above reasons we are of opinion that the seizure of the dividends of the 148 shares of the Molson's Bank stock ought to be maintained, while that of the rents due by Freeman should be annulled and the judgment of the Court below is reformed accordingly.

Ramsay, J., who dissented in one case (No. 431) observed :

These three appeals all refer to one transaction. In execution of a judgment obtained by respondent against Molson, the dividend there might be on certain bank stock was seized, and also the rents due on a certain house the property of Molson.

The seizure is contested by Molson on the ground that the house, the rents of which are seized, and also the bank stock, forms part of the property he received from his father's estate, under the will of the father, by which the property bequeathed was not only substituted, but was declared *in-*

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saisissable, both as to the capital and as to the interest and revenues thereof.

Mrs. Molson contests on the ground that she has an interest in this property, and consequently an interest to declare it *insaisissable*.

Thirdly, Mrs. Molson and her children raise the same question.

With regard to the Bank stocks, it is not shown that they represent any part of the property of the late John Molson's estate. They have not been kept separate, and are not distinguishable, or at least they have not been identified.

Then, as to the two last contestations as regards the revenues of the house, I don't think the intervening parties, Appellants, have shown any interest. They might have an interest if the house itself was seized. But at the argument it was said that at any rate they had an interest, because if Molson required aliments they could be compelled to supply them. If this argument were tenable, all relatives subject to the possible obligation to furnish *aliments* to each other would have a right to intervene in the suits brought against any one of them for their own protection. This is evidently not the case, and I am of opinion that both these appeals should be dismissed.

The pretention of Molson is met on quite different ground. Respondent says, in the first place, that the house, the rent of which is seized, does form part of the estate of the late John Molson. That by the will of John Molson the executors, or the survivors of them, had power to sell all the real estate in order to make a division of the property, and that the proceeds of the sale should take the place of the original property; that they exercised this power, and executed deeds of sale to the various members of the family, and that the proceeds of these sales from that moment became the property substituted and declared *insaisissable.*

Respondent also contends that he lent to Molson his money, sought to be recovered by this execution, on the faith of a deed of sale duly enregistered, showing an unincumbered title in Molson; that if Molson's title was bad, it was so to the knowledge of Molson, and that by showing him a clear deed he had obtained respondent's money by fraud; ant that as no one can profit by, or plead his own fraud, the defence

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in the mouth of Molson is inadmissible. He contends also, that there is evidence that Molson had been advised by counsel before the money was paid to him by respondent, that his title was defective.

Appellant makes answer to this: that the sale was merely a *partage* clothed with the form of a deed of sale, that the real character of the transaction was apparent on the face of the deed, which refers to the will, and that as it required two executors to convey the title, and as Alex. Molson could not convey to himself, there remained only William Molson as vendor, and therefore respondent had full notice that the deed could not be the whole title, and that he had to look to the will. That, in fact, there was no misrepresentation; that respondent's lawyer, who treated in the matter of the loan, had been the appellant's lawyer in the matter of the *partage* under the will, and that he had been made aware at the time of the loan, of the opinion of counsel that the title was bad as a deed of sale, and was in effect only a *partage*.

It is maintained by the Appellant that, even if there were fraud, there is a prescription of the law which exempts from seizure "sums of money or objects given or bequeathed upon the condition of their being exempt from seizure." (558 C. C. P.)

I do not think we are obliged in this case to enter into the first question, namely, whether the transactions by way of sale are only, in effect, a mode of making a *partage*, as between the heirs and their *ayants cause*. I may, however, observe *en passant*, that if the argument is sound, it seems hardly to go far enough, for if the executor, appellant, could not sell to himself he could not apportion to himself in any other way. The whole transaction, then, is null, if the sale be null as a sale. I may also express a doubt whether the sale by the executors to one of themselves is null *de plano*, and whether the executor who has made such sale can himself invoke its nullity. It may be questioned whether he has not had the full advantage of his father's bequest, and that the will is satisfied. If he has, his squandering his succession was evidently within his powers.

But, as I have said, I express no formal opinion on these questions, for I am strongly of the opinion that Molson obtained the money, if the deed be bad, by fraud, and that he

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cannot set this up. As for the provision of the C. C. P. referred to, it is only a general enumeration of things *insaisissables*, and in no wise is to be taken as a new enactment overriding the common law. Now, I think the rule that no one can plead his own fraud is a fundamental principle of justice—one of those principles, which, whether expressed or not, must naturally be considered as untouched by particular rules. The texts of law which recognize this principle are numerous and well known—" no one can enrich himself at the expense of his neighbour," " no one can profit by his fraud," and so forth. Nor on general principle can fraud be covered by the protection given to special persons. Thus a woman is protected against her weakness, not against her fraud. And so we have the well-known rule, *mulieribus tunc succurrendum est, cum defendantur, non ut facilius calumnientur*. De Reg. jur., 110. And so the wife had not the benefit of the *Senatus-consultus Velleianum* when she took a part in the fraud. Several instances in illustration of this principle are given in the code. And to the rule I know no exception, save when the fraud is in violation of a law of public order. The law which permits a donor to attach the condition he chooses, which is not against good morals, and hence to declare that the thing given is for aliments, and is *insaisissable*, does not fall into this category. And this suggests another idea, and it is, that if the restriction of the donor was to cover the frauds of the donee, it would be immoral, at all events in its effects, and consequently opposed to the spirit of art. 760.

Yet another argument has been used. It is said that the deed of loan and hypothec and alleged fraud are not in question now, that the rents of the house were not hypothecated to Carter, that when returned into Court they will be subject to the claims of all creditors who have not been defrauded, and consequently Carter, who has been defrauded, must suffer. This is a strange conclusion. Carter says this: these revenues are the product of what you have hypothecated to me, and if I am not protected in the revenues of the thing my security is illusory. I think the rule, that the accessory follow the principal, applies here. Besides, it can hardly be said that this was the real ground of contestation. The whole argument was, that there was no fraud, and that the property

was *insaisissable*. I do not think, then, that we can escape from the responsability of deciding one or both of the questions. For my part, I have no hesitation in saying that there was fraud on the part of Molson, and that he is estopped from pleading it. *Dolo suo non debet quis lucrari, neque aliis nocere*, 92, *in fin. C. de Transactionibus*, l. 30. Even if the evidence as to Mr. Dorion's opinion were to disappear, Molson was presumed to know the title he was giving.

Judgment reversed

Barnard, Beauchamp & Creighton for Appellant.
Abbott, Tait & Abbotts for Respondent.
S. Bethune, Q. C., and *Pagnuelo, Q. C.*, counsel for Respondent.

MONTREAL, SEPTEMBER 19th, 1883.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, J. J.

No. 514

HENRY J. FISK,

Defendant in the Court below,

APPELLANT;

&

VIRGINIA G. STEVENS,

Plaintiff in the Court below,

RESPONDENT.

The parties in the suit were married in the City of New York, where they then had their domicile. Later, they both established their domicile in the province of Quebec, but the Respondent since then has obtained a divorce before the Supreme Court of the state of New York, and instituted the present action against her husband in the province of Quebec, without any previous authorization.

HELD.—That the divorce which the Respondent has obtained in the state of New York does not affect the Appellant, who then had his domicile in the province of Quebec by the laws whereof marriage is indissoluble, and that, therefore, Respondent could not bring the present action without being previously authorized to do so.

The appeal was from the judgment of the Superior Court, Torrance, J., 25th. February 1882.

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Cross, J., (*diss.*) On the 29th August, 1881, Virginia Gertrude Stevens instituted an action in the Superior Court at Montreal against Henry Julius Fisk, in which she alleged that in May 1871, they, the plaintiff and defendant, were married in New York, their actual and intended domicile. They made no ante-nuptial contract. Their proprietary rights were consequently governed by the laws of the State of New York, which permitted her to retain the absolute and exclusive ownership, control and disposal of all property, effects and rights belonging to her previous to and at the time of her marriage; that she was at the time owner of valuable effects and securities amounting to $220,775.74, then held for her by trustees who subsequently placed them in her control, who thereupon allowed the defendant her husband to take possession thereof as her agent and trustee. He remained in possession thereof until September, 1876, when plaintiff demanded the return thereof with an account of his management, which he failed to give. He only returned a small portion of her said fortune, disposing of the balance and appropriating the same to his own use, and refusing to account for the proceeds thereof. Further, that in December, 1880, the plaintiff was legally divorced from the defendant by a decree of the Supreme Court of the State of New York, equivalent to a divorce *a vinculo matrimonii* pronounced in favor of the plaintiff by the Dominion Parliament, and thereby became entitled to exercise all the rights of a *fille majeure usante de ses droits*. Concluding that the defendant be ordered to account for and pay over to the plaintiff the balance in his hands, and in default to do so that he should be condemned to pay the plaintiff $222,000.

The defendant demurred to the declaration as insufficient in law, on the ground that the domicile of the parties had been for years in the Province of Quebec, and that therefore no legal dissolution of the marriage had been effected.

A hearing was had on this demurrer and it was dismissed.

To the merits the defendant Fisk, now appellant, pleaded that after the parties married in New York they came to Montreal and acquired a new domicile in the Province of Quebec, which new domicile they had at the time of the pretended divorce and for years previously; that therefore the

pretended divorce was null and void and the plaintiff was not authorized to institute the action. Henry J. Fisk & Virg. G. Stevens

Also a plea of general issue, *défense en fait.*

In answer Stevens reiterates the validity and sufficiency of the divorce, averring that her husband was personally served with the complaint in the divorce suit, and appeared by his attorneys without declining the jurisdiction; that if even the divorce were invalid she would still have a right to demand from Fisk an account of his gestion of her fortune as well by the law of New York as by that of Quebec.

The facts seem to be briefly as follows:—In 1871, on the 7th of May, the parties Fisk and Stevens, both being native American citizens, were married in the city of New York in the State of New York, having then their domicile in the city of New York. In October, 1872, Fisk came to reside in Montreal and from that time continued to reside there. With occasional periods of absence, his wife finally left him in 1876, returning to New York, but thereafter passing a part of her time in Paris and part in New York. Mr Shelburne, an attorney of the State of New York, examined as a witness, swears that after leaving her husband she was a resident of New York, particularly at the time of the institution of the action which she brought against her husband for divorce, and it is presumable that if she could have any other domicile than that of her husband it would be a reversion to her original domicile in the city of New York.

In February, 1880, she commenced a suit in the Supreme Court of New York, against her husband for divorce for cause of adultery; it was served upon Fisk at Montreal, in this Province; he appeared by attorney, and, after proof had, a decree of divorce was pronounced there which is proved to be, according to the laws of the State of New York, an absolute dissolution of the marriage, *a vinculo matrimonii*, more especially as regards her, Virginia Gertrude Stevens.

At the time of the marriage she was possessed of a considerable fortune in her own right, which soon after her marriage she entrusted to the care and custody of her husband.

It appears by the proof adduced that by the laws of the State of New York the husband has no control over the separate property of the wife. She continues, notwithstanding

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the marriage, to exercise her rights over her own property the same as if she were a *feme sole.*

The present action was brought by her against the said Henry Julius Fisk for an account of her fortune which she had entrusted to him and for which, to a large amount, he had refused to account.

She sues as a *feme sole*, setting forth the facts of the marriage, the divorce, Fisk's possession of her funds and his refusal to account.

There is no difficulty about the facts. Fisk defends himself upon two grounds.

1st. The invalidity of the divorce.

2nd. The absence of authority on the part of the respondent, Virginia Gertrude Stevens, a married woman, to bring the action.

Save as matter of simple administration the second ground, according to our law and practice, would probably be a conclusive answer to the suit, if true in fact, that is, if the marriage between her and Fisk still subsisted; C. C. 176 : "A wife cannot appear in judicial proceedings without her husband or his authorization."

183. "The want of authorization by the husband constitutes a cause of nullity which nothing can cover."

But she may be authorized by a Judge—C. C. 178. For matters purely administrative the wife separated as to property may sue without being authorized by her husbaud, C C. arts, 176, 177, 178. I do not propose to decide whether the present suit is administration or not, but will proceed to deal with the main question.

If the divorce be operative autorization is of course unnecessary. The crucial question is whether the divorce so obtained from the Supreme Court of the State of New-York, has force in the Province of Quebec.

In the Province of Quebec the law recognizes no right of divorce; it can only be obtained through the legislative force of the Dominion Parliament.

The main contention of the appellant is that at the time the divorce was applied for, the parties had their domicile in the Province of Quebec, and that the Supreme Court of the State of New-York had no jurisdiction.

It is contended that it is actual domicile that gives jurisdiction in such cases, and that the wife being incapable of having any domicile save that of her husband, the actual domicile of Virginia Gertrude Stevens was in the Province of Quebec, in Canada, at the time she adopted her proceedings for divorce, and that she could not legally resort to any jurisdiction other than in the Province of Quebec or Dominion of Canada to obtain it.

That rule would have a very reasonable application if the actual domicile of the husband was the domicile of origin of the parties, or was even their matrimonial domicile, but there are strong, to my mind, convincing reasons why it should not apply to the present case.

In the first place the parties are citizens of another State, to a certain extent still owing allegiance and obedience to its laws, which obligations they have never repudiated, nor have they ever renounced to their claim for their protection, although by passing into another State they have thereby undertaken not to offend against any of its institutions or laws. The law of the country to which they have removed does not recognise any legal right to a divorce, although it may be granted by the legislative force of an act of Parliament. Their own original State to which they still owe allegiance recognises a legal right to divorce for cause. In entering into the contract of marriage both parties stood on the same ground as regards the validity of the contract and the conditions of their consent. The subjection of the wife to the husband did not impair these conditions or the right of either party to invoke them. They married under a law which made the contract subject to dissolution for cause. Admitting that the wife undertook to follow her husband, it was always subject to the right to invoke the condition, that if the husband was unfaithful in the execution of the contract she could, for cause sufficient according to the law where the contract was made, ask for its dissolution. Could the husband by carrying her to a country where this right was not recognised deprive her of it? It seems unreasonable to say that he could. Would such an act not be a fraud upon her rights? In my opinion it would. It is vain to say that on account of the subjection of the wife she could not raise the point. Her subjection is on condition that the husband fulfils

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the contract on his part. What goes to the validity of the contract revives the right of the wife as a party *sui juris* seeking for its fulfilment. If the argument of actual domicile were allowed to prevail, it would in every such case put it in the power of the husband to defeat the wife's right by taking her to a place where her right could not be enforced, or even himself removing to such a place, for by fiction of law and at least for certain, and perhaps for most purposes, his domicile would be held to be that of his wife also. Again, in this particular instance the parties were citizens of New-York, they made their contract there. Admitting that they afterwards resided abroad, if both parties found themselves in the State of New-York, would a *bonâ fide* suit there, not subject to the suspicion of fraud or evasion, not be competent to the parties? There seems no valid reason why it should not. The act performed in this case was equivalent to the case stated. V. G. Stevens being in the State of New-York, cited Fisk from Montreal, Canada; he appeared, which was equivalent to his being in New-York and being served there; he made no objection to the jurisdiction and was condemned on evidence. Can he now repudiate the force of that decree? It is said that consent does not give jurisdiction. That is true of defect of authority in the tribunal, but it is not true of voluntary submission to or coming within the jurisdiction of a tribunal that has authority, more especially as regards a personal obligation in respect of which its fulfilment may be claimed anywhere that the law recognises it to have binding force. Especially is it appropriate that the sovereign authority which gave the contract its binding force should be the one to decree its dissolution for default of the fulfilment of the essential conditions on which its permanence was to depend.

It perhaps might, with reason, have been argued that if the tie had been created within the sovereign authority of a State whose laws did not permit of a dissolution, and the parties afterwards resorted for a divorce to New-York, where the law permitted it, such divorce might be good within the State of New-York, but would not be effective in the State or country of their matrimonial domicile.

It was argued that the Imperial Statute establishing the Divorce Court there, in giving authority to a resident there

to be plaintiff in a divorce suit, exceeded and became an exception to the general rule which required the parties to be actually domiciled within the jurisdiction, but it seems to me that this argument is based upon the supposition that there is or ought to be such a general rule, the reason of which is not only doubted, but seriously questioned, and as I have already shown, puts it in the power of the husband to deprive the wife of all remedy. It might rather be inferred that the English legislation was the negation of any such rule, and in fact the sanction of a contrary rule as correct in principle.

Our own Civil Code, Art. 6, says:—"An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons, but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country."

This should be true as regards other countries claiming jurisdiction over their subjects in Canada.

Bishop ("Marriage and Divorce") considers that a wife may acquire a domicile for the purposes of a divorce. This may be more true as between the States of the Federation than in regard to foreign countries, but the case is different when she is sought to be deprived of one.

It is to be borne in mind that the status of strangers is not created, but is only recognised here, that its creation abroad would have no force here save by comity, and the change of status operated by the power that created it, leaves the parties strangers with the status only which the sovereign power, to which they owe their allegiance, has given them, and in this case there is the same reason for the recognition of the status given them by the dissolution of the marriage as that first given them by the marriage itself; both acts equally depend on the foreign law, the force of which is only recognised by comity.

What some authors call acts of voluntary jurisdiction exer. cides by foreign Courts are recognised by the sovereignty of each country comity, as strictly speaking no judicial act has

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force beyond the sovereign territory for which and by whose power it is promulgated.

Foelix, t. 2, p. 384, No. 10, 2me ed. :—" Quant à la validité intrinsèque et pour ce qui concerne le futur conjoint étranger, il faut appliquer les lois du pays de son domicile, sur tout ce qui est relatif à l'état et à la capacité de sa personne." See also *Muller* v. *Hilton*, 13 L. A. R., p. 1.

Le droit international, théorique et pratique, par Charles Calvo, 2me ed., t. 1, p. 366, § 247: " Si la célébration des mariages est une affaire d'intérêt public et social, la dissolution du lien conjugal n'a pas une importance moindre; elle est régie par les mêmes principes de jurisprudence internationale. Ainsi la dissolution d'un mariage judiciairement prononcée par voie de séparation de corps et de biens, ou par voie de divorce conformément aux lois du pays où le mariage a été célébré et où les conjoints avaient leur domicile, produit ses effets dans toute autre contrée. Mais d'après quelle règle se guider et quel principe doit-on appliquer quand la rupture du lien conjugal est poursuivie dans un autre pays que celui de la célébration du domicile, ou dans un pays dont la législation diffère de celle de la patrie des conjoints, c'est là une délicate question de droit international privé, qui a suscité plus d'un conflit. Pour la résoudre il faut tenir compte de la nationalité et du statut personnel des époux. Si les conjoints appartiennent à un pays et à une communion qui repoussent le divorce, c'est-a-dire la rupture absolue définitive du lien conjugal, et admettent seulement la séparation de corps et de biens, ils ne peuvent légitimement tant qu'ils conservent la même nationalité, la même croyance religieuse, faire dissoudre leur union matrimoniale en se transportant dans un pays où prévaut le divorce avec faculté de conclure un autre mariage; car s'ils agissaient ainsi ils s'exposeraient quand ils retourneraient dans leur patrie à y être judiciairement poursuivis et condamnés comme bigames. Lorsqu'au contraire les époux appartiennent à un pays dont les lois intérieures sanctionnent le divorce, et qu'usant du bénéfice des lois qui régissent leur statut personnel ils ont régulièrement fait prononcer la dissolution complète de leur mariage, ils doivent partout ailleurs être considérés comme célibataires et libres de contracter une nouvelle union matrimoniale.

" En résumé, la règle à suivre en cette matière est bien

moins la loi du domicile que celle de la religion, de la nationalité, et du statut personnel qui en découle."

The Italian author Fiore, as translated into French by Pradier Foderé, edition of 1875, at p. 216, No. 120 : after giving the opinion of Rocco, Italian Jurist, wholly to the effect that the dissolubility or indissolubility of the marriage tie, in other words the question of the right of divorce, must be determined by the law of the matrimonial domicile. This proposition in its broadest sense, Fiore disputes, but after reviewing the jurisprudence of different countries, including England, France, Austria, Prussia, the United States of America and Italy, and the opinions of various Jurists, including Merlin, Westlake, Dalloz, Demolombe and others, as well as different arrêts involving various phases of the question, he concludes by giving a kind of qualified assent to Rocco's opinion, which he does in this wise. He puts the question : " Si un homme légitimement divorcé dans sa patrie peut se remarier dans un état tiers dont la loi ne permet pas le divorce." He remarks : " Cette question a été longuement discutée par les jurisconsultes et par les tribunaux." He reviews the opinions and decisions on the subject, the weight of which are in favor of validity, and concludes as follows :

No. 134. "Nous partageons la même opinion et en en faisant l'application nous disons que l'officier de l'Etat Civil ne peut refuser 'assister au mariage d'une anglaise ou d'une polonaise valablement divorcée, et qui voudrait se remarier en Italie. En effet il est certain que la condition juridique d'un étranger et sa qualité de père, de fils, d'époux, doit se déterminer d'après la loi de sa nation, que les effets qui dérivent de l'état juridique d'un étranger ne peuvent être empêchés que lorsqu'on oppose une loi d'ordre public de notre Etat ; que l'officier de l'Etat Civil ne peut déclarer la dissolution du mariage non existant, quand celui-ci a été déja légalement dissous, et qu'il ne peut empêcher le divorce de contracter un nouveau mariage, lequel lorsque le premier est dissous, n'est nullement contraire à nos lois, le divorcé étant dans la situation légale d'un homme non marié. Nous concluons donc que défendre à qui est légalement divorcé de pouvoir contracter un nouveau mariage en Italie est contraire à nos institutions et à nos lois."

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Harvey v. Farnie, L. R. Probate and Divorce Cases, vol. 5, p. 153, and others cited do not militate against the view above expressed.

I find no case where the question in issue comes up under precisely similar circumstances to the one now under consideration. One very nearly like the present is the case of Deck vs. Deck, 2 Law Times, 552; 29 Law Journal N. S., Matrimonial Cases, p. 129, which, although criticized by a Scotch writer on the Law of Husband and Wife, 2 Fraser, 1292, I am not aware has yet been overruled, and the doctrine there enunciated seems reasonable. It was followed by the case of Bond vs. Bond, 29 L. J. Mat. 143, very nearly resembling the present case. In the first it was ruled that a natural-born English subject does not by the acquisition of a foreign domicile shake off his allegiance to the Crown of England, but continues liable to be affected by the laws of England. The wife sued for a divorce in England for cause occurring in New York, where the husband had gone; he was cited by service upon him in New York, but failed to appear. The Court held that they had jurisdiction, and granted the divorce. In lhe case of Bond vs. Bond, an English woman married a foreigner, the marriage being celebrated in England, where for a time they lived together; they also lived together abroad. The wife afterwards being in England cited the husband from abroad. (Ireland). The Court held that they had jurisdiction, and granted the divorce. In any case the choice of a domicile is a voluntary act, and may be relinquished voluntarily. The husband's appearance to answer the suit in New York may be considered equivalent to his being found and served with process in New York to answer the divorce suit. I think such a service of process upon Fisk would have given the Court jurisdiction over the case, and in my opinion his appearance to answer his wife's suit had the same effect. I consider the divorce obtained by Mrs. Fisk in the Supreme Court of the State of New York valid, and would hold it binding on him here. I would therefore confirm the judgment of the Superior Court, which held him accountable to Virginia Gertrude Stevens, heretofore his wife, for the restoration of her fortune.

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RAMSAY, J.—This action was brought by the respondent, who alleges that she is the divorced wife of the appellant, asking him for an account of the fortune she brought him at her marriage and which passed into his hands.

She alleges that she was married in the State of New-York in May 1871, New-York being then the domicile of both parties, that by the law of that State, there being no ante-nuptial contract, she had the absolute control of her property, and she alleges further that by a decree of the Supreme Court of New-York she was divorced from her said husband, and that she is thereby in the position of a *feme sole* and entitled to bring this action as such.

The appellant pleaded that the parties after their marriage came to Montreal and acquired a new domicile in the Province of Quebec, which new domicile they had at the time of the pretended divorce which is therefore null, and that plaintiff could not bring this suit.

There was also a *défense en fait.*

The respondent replied, that the husband was served with the action in New-York, that he appeared and did not decline the jurisdiction of the Court.

The questions that arise on these pleadings are: 1st.—Is the divorce valid? 2nd.—If not a divorce here, could the wife bring the action without authorization; and subsidiarily thereto, is the absence of authorization properly raised by demurrer and plea to merits? And 3rd.—Does the failure of the husband to decline the jurisdiction of the Court in the State of New-York make its decision *res judicata* as against him?.

The first of these questions is manifestly the most important and the most difficult. In deciding it we must have recourse to our own law, if its rule can be discovered. But before we attempt to lay down principles, it is necessary to arrive, at a definite conclusion as to the main facts that are contested. It would seem that it is not denied that by the law of the State of New-York the married woman's property remains separate, and her own, unless there be some special disposition of it. Whether this be the sound exposition of the law of that State we are not now called upon to enquire, as no such question appears to have been raised, and on *faits et articles* the husband admits having received a tin box con-

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taining securities in bonds and cash, " the separate property and fortune" of respondent. Both parties were American citizens, although the State of New-York was not the native State of either; but both seem to have had their principal abode there, where the marriage was celebrated, and where they lived, except for short periods till the autumn of 1872.

It seems also clear, that appellant and his wife took up their abode in Montreal as their permanent residence, and that the husband acquired a new domicile there which became that of his wife. She could have none other, according to our law, unless separated from bed and board. C. C. 83. It is, however, proved that the respondent at the time of instituting the suit for a divorce in New-York, had that sort of residence there, which, by the laws of that State, gives jurisdiction to its courts to pronounce a decree in divorce.

The precise legal question we have, then, to decide is this —whether a wife domiciled with her husband in the Province of Quebec can of her own movement, and without any separation as to bed and board, remove to another place, take advantage of the law of the place of marriage to obtain a divorce *a vinculo matrimonii*, which is absolutely prohibited by the laws of this Province, and afterwards come back here and act as an unmarried woman.

It is argued that if she cannot do this, it is competent for any man, married in a country where divorce *a vinculo* is permitted, by changing his domicile, to deprive his wife of the advantage of dissolubility, if I may use such a word. I am not sure that this is the necessary consequence of refusing the wife the rights claimed in this case; but if it were, I am not prepared to say that this argument appears to me to be conclusive. In one sense it may be considered a hardship to the wife, but it is one against which it can hardly be expected our law should specially provide. The remedy for the evils complained of by the respondent, is the separation *à mensa et thoro*. Our law having provided a remedy, and having positively refused another, I do not think, the husband having retained his domicile in this Province, his wife can seek another domicile and destroy the *status* of an inhabitant of Canada.

The case of *Rogers* v. *Rogers* (3 L. C. J. 65,) was cited in

support of the contrary view. But in that case all that the court decided was that community did not exist between husband and wife married in England, then their domicile, subsequenty removing to Canada. The doctrine recognized by this decision may perhaps be doubted (Story, Conflict of laws § 176). It seems, however, to be the doctrine of Pothier. But the discussion turns entirely on the question of whether community is a *Statut réel* or *personnel*, and consequently it does not apply to the case before us, because we are not to consider the effects on the property of the conjoints but as to their personal *status*.

On the second question I am of opinion that the judgment of the Supreme Court of the State of New-York does not produce the effects of *res judicata* as against her husband. It is essential that the Court should be competent. Now, the competence does not mean that the Court shall be competent according to the laws of its own State, but that its modes of procedure be not an infringement of the rights of another State. Summoning Mr. Fisk domiciled in Canada to appear in New-York is summoning him to appear before those who are not his natural judges. And his appearance, without further proceedings, does not appear to me to alter the matter

It has been said that this action lies even if there be no divorce, and that the husband is obliged to account to his wife for her property. This is very true, but it is contended that she has brought the action as an unmarried woman and without authorization. The prohibition of our law as to the wife appearing in judicial proceedings without the authorization of the husband is express (176 C. C.), and I am not aware that there is any mode of supplying this authorization after the suit is commenced. "She cannot appear," and therefore she is not rightly before the Court, and it is not a question of amendment. To substitute an authorization by the Court is to antedate a power, and one which can only be exercised by the Court on the refusal of the husband (C. C. 178) or if he be interdicted or absent, (C. C. 180). But it is said the want of authorization has not been properly pleaded, and a case of *Anntaya* v. *Dorge* et al., (6 R. L. 727) was cited in support of the pretention that this question could only be

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raised by a preliminary plea. I question very much whether if the defect appears on the face of the proceedings it is necessary to plead it at all, but I think it at all events is a good plea to the merits. It is not a question of *status* only, it is a lack of power. But in addition to this, the whole of the action turns on the alleged fact that she is an unmarried woman.

I am therefore to reverse and dismiss the action *sauf à se pourvoir.*

DORION, C. J.—This is an action which the Respondent, as the divorced wife of the Appellant, has brought against him for an account of a sum of $220,775.74, which she alleges she placed in his hands after their marriage to manage for her, as her agent and trustee, and for which he refuses to account.

The facts, about which no controversy arises, are these :

In 1871 the parties were married in the city of New-York, where they then had their domicile. In 1872 they both came to Canada, and took up their residence in the city of Montreal, with the intention, as declared at the time by the Appellant under his own signature, of permanently fixing his residence in this Province. Since that time the Appellant has been carrying on business in this city, where he has uninterruptedly continued to reside.

Some time about 1876 the Respondent, who had also resided here since 1872, left the Appellant's domicile, and has since been living either in Europe or in the United States. In 1880 she sued her husband before the New-York Supreme Court, and in December of that year she obtained a divorce on the ground of adultery. The Appellant fyled an appearance before the Court, but did not contest the suit.

On the strength of the decree of the New-York Supreme Court granting her a divorce, the Respondent, without any previous authorization from a Court or Judge, assuming to be single has entered the present action against the Appellant for an account of moneys she has entrusted to him during their marriage.

The Appellant has demurred to the declaration, which demurrer has been dismissed. He has also fyled a plea to the merits by which he alleges that at the time, and for years

previous to the pretended divorce invoked by the Respondent, the parties had acquired a new domicile in the Province of Quebec, and that the pretended divorce is null and void; and also that the Respondent has not been and is not authorized to institute the present action.

The Respondent has answered by asserting the validity of the divorce pronounced by the New-York Supreme Court, and by alleging that even if the divorce were not valid, she would nevertheless have a right to demand from the Appellant an account of the administration of her fortune, both under the laws of the State of New-York and under those of this Province.

Three questions arise under this issue.

1. Does the divorce which the Respondent has obtained in the State of New-York affect the Appellant who, at the time it was obtained and for years previous, had his domicile in the Province of Quebec?

2. If the decree of the New-York Supreme Court granting a divorce to the Respondent is not binding here, could the Respondent bring the present action without being previously authorized to do so?

3. Has the Appellant properly raised by a plea to the merits the question as to the validity of the divorce obtained by the Respondent and her want of authorization to sue, and should not these questions have been the subject of preliminary exceptions?

A change of domicile is effected by actual residence in another place, coupled with the intention of the person to make it the seat of his principal establishment. (Article 80, C. C.)

The proof of such intention results from the declarations of the person and from the circumstances of the case. (Article 81, C. C.)

In the present case we have the declaration made in writing by the Appellant to the Custom House officers on entering this Province, that he came with the intention of settling permanently in this country, coupled with the facts that he has opened a business and has uninterruptedly resided at Montreal, since he made that declaration, ten or eleven years ago.

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There can, therefore, be no doubt that the Appellant has abandoned his domicile in the State of New-York and has acquired a new domicile here.

The Respondent has followed her husband here, where she has resided four years with him, and our Civil Code (Article 83) establishes that "a married woman, not separated from bed and board, has no other domicile than that of her husband. Both the Appellant and Respondent have therefore had their legal domicile in the Province of Quebec since they arrived here in 1872, the absence of the Respondent for the last few years notwithstanding.

It is also undeniable that, according to the laws of the Province of Quebec, the marriage tie is indissoluble, and that divorce is not allowed, but is, on the contrary, considered as opposed to public policy. There are no tribunals here authorized to grant a divorce, that is, to dissolve for any cause whatsoever a marriage lawfully contracted; and to allow a divorce pronounced by a foreign Court to affect here the personal status of persons having their domicile in this country would be to admit that foreign tribunals have a jurisdiction and power over persons domiciled here which our own Courts have not.

No case has been cited and no authority adduced to show that judgments rendered in a foreign Court, contrary to the public policy of the country where the parties concerned have their domicile, at the time, have anywhere, a binding effect on such parties in the country of their domicile, and we may safely assert that no such authority is to be found. The books are full of decisions to the contrary, and the application of the rule is not confined to any particular country, but seems applicable to all.

Fœlix, Droit International Privé, vol. 1, p. 19, says :

" No. 9.—Le premier principe général, en cette matière, résulte immédiatement du fait de l'indépendance des nations. Chaque nation possède seule et exclusivement la souveraineté dans l'étendue de son territoire. De ce principe il suit que les lois de chaque Etat affectent, obligent et régissent de plein droit toutes les propriétés immobilières et mobilières qui se trouvent dans son territoire, *comme aussi toutes les personnes qui habitent* ce territoire qu'elles y soient nées ou non, etc......

"No. 10. Le second principe général c'est qu'aucun Etat, aucune nation, ne peut par ses lois, affecter directement, lier ou régler des objets qui se trouvent hors de son territoire, *ou affecter ou obliger les personnes qui n'y résident pas, qu'elles lui soient soumises ou non par le fait de leur naissance......*

"No. 11. Les deux principes que nous venons d'énoncer engendrent une conséquence importante et qui renferme notre doctrine toute entière ; c'est que tous les effets que les lois étrangères peuvent produire dans le territoire d'une nation dépendent absolument du consentement exprès ou tacite de cette nation.

P. 58. "*Après le changement* de nationalité *ou de domicile*, changement dont nous parlerons ci-après, la loi de la nouvelle patrie *ou du nouveau domicile exerce sur l'individu les mêmes effets que celle de la patrie originaire ou du domicile d'origine avait exercés jusqu'alors.* Mais il va sans dire que la loi de la nouvelle patrie n'a pas d'effet rétroactif sur les actes passés antérieurement par les individus."

P. 29. "Aucune nation ne renonce, en faveur des institutions d'une autre, à l'application des principes fondamentaux de son gouvernement ; elle ne se laisse pas imposer des doctrines qui selon sa manière de voir sous le point de vue moral ou politique, sont incompatibles avec sa propre sécurité, son propre bien-être, ou avec la consciencieuse observation de ses devoirs ou de la justice. Ainsi aucune nation chrétienne ne tolère en son territoire l'exercice de la poligamie, de l'inceste, l'exécution de conventions ou de dispositions contraires à la morale."

Story, Conflict of Laws, § 25, expresses the same doctrine when he says : "No nation can be required to yield up its own fundamental policy and institutions in favor of those of another nation ; much less can any nation be required te sacrifice its own interests in favor of another, or enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness or conscientious regard to justice and duty."

And again at § 32 : It is difficult to conceive upon what ground a claim can be rested, to give to any municipal laws extra-territorial effect when those laws are prejudicial to the rights of other nations and their subjects."

It is a maxim, said Best, J. in Forbes & Cochrane (2 B &

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Cr. 471), "that the *comitas inter comitates* cannot prevail, in any case, where it violates the law of our own country, the law of nature or the law of God."

In the case of Hannover *v.* Turner (14 Mas. Rep. 240), in which a divorce obtained in the State of Vermont was held to be null, because at the time, the parties were domiciled in Massachusetts, Putnam J. said: "If we were to give effect to this decree we should permit another State to govern our citizens, in direct contradiction of our own statute, and this can be required by no rule of comity."

Apart from the question of public policy, and which deprives the decree obtained by the Respondent of any binding effect, it is also null and void on the ground that it was obtained *in fraudem legis.* It is evident that the Defendant, who was domiciled here with her husband, has withdrawn from the jurisdiction of our courts to seek in a foreign tribunal a relief which she could not have obtained in those of her own domicile.

The remarks of Spencer, J., in the case of Jackson & Jackson (1 Johnson's Rep. 426), are so appropriate to this case that I deem it proper to cite here a short extract of what he said in giving the judgment of the court:

"The case being thus open for examination, the question at once arises, how far this court will lend its assistance to carry into effect, between its own citizens a judgment of a foreign court, where the Plaintiff has resorted to that court with the avowed object of gaining relief in a case not provided for by our laws and against the policy of them. I say against the policy of our laws, because our own Legislature, having authorised divorce but in one case, intolerable severity of treatment does not warrant a divorce."

"Here is a plain attempt by one of our own citizens to evade the force of our laws. The Plaintiff, to obtain a divorce which our laws do not allow, instituted her proceedings in Vermont, whilst she was an inhabitant and an actual resident of this State, and *while her domicile continued in this State*, for she was incapable during her coverture of acquiring a domicile distinct from that of her husband.

"The Plaintiff having acted with a view to evade our laws, it would be attended with pernicious consequences to aid this attempt to elude them.

"It may be laid down as a general principle, that whenever an act is done *in fraudem legis* it cannot be the basis of a suit in the courts of the country whose laws are attempted to be infringed."

The principle so broadly laid down in this case was acted upon in a judgment rendered by the Cour Impériale de Poitiers, on 7th January, 1845 (Dev. & Car. 1 Cas. 1845-2-215), and a divorce obtained in Switzerland by a Frenchman who had become a naturalised subject of that country, and the two subsequent marriages which he had there contracted while his first wife was living, were declared null and void, as having taken place in fraud of the laws of France. (Fœlix, vol. 1, p. 68, note a.)

I may venture to say, that this rule prevails everywhere, and on this ground also the decree of the New-York Supreme Court should be held to have no binding effect in this Province.

It is however, contended that in matters of divorce it is not the laws of the actual domicile of the parties, but the laws of their matrimonial domicile, to which reference must be had; and that as Appellant and Respondent were married in the State of New-York, where marriage was then and is still dissoluble, either party had a right to resort to the tribunals of that State to have the marriage dissolved for causes for which a divorce is allowed by the laws which are there in force

The Respondent, who urges this claim, proceeds on the assumption that divorce is a remedy on the contract of marriage which has taken place between the parties,—and that either of them has an acquired right to claim a dissolution of the marriage tie for causes which, at the time it was contracted, were held, by law, sufficient to obtain a divorce.

This doctrine of an acquired right to a divorce has been denied by all the French writers. Mailler de Chassât, de la rétroactivité des lois, vol. 1, p. 229, says on this subject:—"Le divorce ou l'indissolubilité du mariage est dans le domaine de la loi; et la disposition qui consacre l'un ou l'autre est une disposition d'ordre public, et par conséquent une pure concession qui ne confère aucun droit acquis."

The author quotes Merlin, in support of the view he takes of this question, and concludes by saying: "Cette doctrine est incontestable," &c .....

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If a marriage contracted in a country where divorce is recognised conferred on the contracting parties a right which followed them wherever they might be domiciled, they ought, according to the comity of nations, to be able to enforce such right, as all their other matrimonial rights, before the tribunals of their actual domicile without having to resort to those where their marriage has taken place. Yet, it cannot seriously be contended, that the Respondent could have claimed that a divorce should be granted to her by our own courts, on the ground that she was married in the State of New-York, where divorce is allowed.

The question, in the precise form in which it is presented in this case, does not appear to have been yet decided either in the United States, in England or in France.

Story, § 232, asks this question: "What would be the " effect of a marriage in Connecticut, a subsequent *bona fide* " change of domicile to New-York, and then a divorce in " Connecticut, both parties appearing in the suit, remains as " yet undecided."

It must be observed that in the supposed case there would arise a mere conflict of jurisdiction and not a conflict of laws, since the laws of the State of New-York admit of divorces as well as those of Connecticut, and notwithstanding, it seems to have been a subject of serious doubt, whether a divorce in such case, when both parties had appeared, could be recognised by the courts in the State of New-York, and on this point Story expresses no opinion. If, in addition to the conflict of jurisdiction, which, in most cases, may be covered by the voluntary submission of the parties to the tribunal seized with the contestation, there was a conflict of laws, as there is in the present case, there can be little doubt of what would have been the views of the author.

Westlake, in his work on Private International Law, p 215, No. 360, referring to the question of a divorce pronounced in a country where the parties are only transiently sejourned, says: "And, as the Government of their domicile has the " strongest interest in the morals of men, it is not probable " that any country will recognise these foreign divorces " of its resident subjects. They are certainly not recognised " in England."

At number 361, the writer says: "Admitting, then, the

"necessity that the jurisdiction shall be founded on domi-"cile, etc."

The Courts in England, in their recent decisions, have acted on the rule that actual domicile gives jurisdiction, irrespective of the matrimonial domicile, and this is unmistakably shown by the decisions in Foster & Foster and Berridge, 10 Jurist, N. S. 264; Brodie & Brodie, 4, L. T. N. S. 307; Wilson & Wilson, 27 L. T. 351; Gillis & Gillis, 8 Jr. Rep. Eq., 597; Lesueur & Lesueur, 34 L. T. 511; Firebrace & Firebrace, 39 L. T. 94; and Harvie & Farnie, 42 L. T. 12.

This somewhat indicates what would be the decision in a case exactly similar to the present one.

In France the Courts have gone much further than it is necessary for the purposes of this case, and much further than we perhaps would be disposed to go. They have refused in several cases to recognize the validity of divorces pronounced in a foreign country between persons domiciled in such foreign country. The arrêts are mentioned by Demolombe, vol. 1, No. 101, but the more recent jurisprudence seems to have recognized the validity of such divorces.

The present case must, however, be decided by the rules to be found in our own Code, and we believe that these rules are express and to the point. Art. 6, C. C. provides "that the laws of Lower Canada relative to persons apply to all persons being therein, even to those not domiciled there; subject as to the latter, to the exception mentioned at the end of the present article.

"An inhabitant of Lower Canada (which by section 21 of the schedule to article 17 of the Code, means a person having his domicile in that part of the Province now the Province of Quebec), so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada who, as to their status and capacity, remain subject to the laws of their country."

The exception here mentioned does not apply to the parties in this cause who have their domicile in this country. Their status and capacity must, therefore, be governed by the laws of this Province. They came here as a lawfully married couple, as man and wife, and they cannot change

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that personal status, except according to the laws in force in this Province; and as there is no law here authorizing a divor ce they must be held to be married, as long as they retain their domicile in this Province. There is no plainer provision of law than the one just cited—and to show that it is not susceptible of any other interpretation than the one given,—we have only to quote a short passage from the report of the commissioners who prepared the code. At page 144 of their second Report, Vol. 1st, p. 144, the commissioners say on Art. 7—which is now the 6th Art. of the Code:—"This article is intended to replace article 3 of the Code Napoleon, which determines what persons and property are governed by the French law... ....

....

"This article, which is of the utmost importance, has "been prepared with care, and is founded on the numerous "authorities cited after each of its paragraphs."

One of the authors cited is Fœlix, which we have already quoted at length.

Boullenois is another, and at p. 157 of the first vol. of his Traité des Statuts personnels, etc., he says: "L'on sent que c'est la nature même des choses et la nécessité qni exigent que lorsqu'il s'agit de déterminer l'état et la condition des personnes, il n'y ait qu'un juge qui doit être celui du domicile, à qui ce droit puisse appartenir."

....

"C'est donc avec beaucoup de sagesse que l'on a réglé que la personne recevait son état et sa condition du lieu de son domicile."

The effect of this rule is that, in case of a change of domicile, the status obtained under the laws of the first domicile is retained until another status is acquired, according to the laws of the new domicile. In the present instance the parties, when they came from the State of New-York, were legally married according to the laws of that State, and they were recognised as such by the laws of this country. If they had been transient travellers they might have returned to their domicile, obtained a decree of divorce under the laws in force there, and on coming back here they would, on principle (although this has been the subject of much controversy in France, Demolombe, vol. 1 No. 101), have been held to be

freed from the bonds of wedlock and treated as single persons are. The moment, however, they acquired a domicile here, their status could not be changed, except according to the laws in force in this Province, that is the laws of their new domicile. This is what Fœlix clearly expresses in the passage of his work already cited. Henry J. Fisk & Virg. G. Stevens

" Après le changement de domicile, la loi du nouveau domicile exerce sur l'individu les mêmes effets que celle du domicile d'origine avait exercé jusqu'alors."

Bourjon-Tit. xi., ch. 4, sect. 2, No. 11, p. 114, of the Ed. of 1770, shows so clearly, by the examples which he gives, the effect, on a change of domicile, of the laws of the new domicile on the status of an individual, that I may be permitted to quote his observations on this subject:

XI. " Si un homme (says this author,) originaire du pays de droit écrit, vient s'établir à Paris, avant d'avoir acquis l'âge que la coutume de Paris requiert pour tester, il ne pourra tester aussitôt que le droit écrit le permet, mais seulement lorsqu'il aura acquis l'âge requis par cette coutume; il est venu à Paris incapable, il y reste tel jusqu'à ce que la loi qui régit sa personne lève l'incapacité."

XII. " La raison est, que c'est elle, alors, qui régit sa personne et non le droit écrit, et, par conséquent, sa capacité qu'il ne peut avoir que par sa disposition, puisqu'il ne l'a jamais eue par la loi même de son premier domicile; mais si cet homme n'avait quitté le pays de droit écrit qu'après avoir acquis l'âge pour tester, et qu'il fût constaté que son testament est antérieur à son changement de domicile, en ce cas le testament serait bon, quoique le testateur mourût à Paris avant l'âge que la coutume requiert pour tester, c'est droit acquis et consommé."

XIII. " Cela est fondé sur ce que le changement de domicile ne peut lui faire perdre un droit et une capacité qu'il avait acquis lors du changement, et *qu'il avait consommé avant icelui*; mais il faut cette consommation et qu'il soit constaté qu'elle s'est faite avant le changement."

XIV. " La nécessité de cette consommation est fondée sur ce que n'ayant pas consommé dans le temps la faculté que la loi de son ancien domicile lui donnait, *cette loi par la suite lui est étrangère*, et il ne peut l'invoquer pour un acte fait dans un temps, où la loi de son nouveau domicile, celle par conséquent qui régit sa personne, lui dénie cett faculté."

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By substituting the word "divorce" for that of "testament" in the above citation, we have the exact position of the parties in this cause defined under the rules of law prevailing before the Code, and which the Code has preserved in its integrity, in preference to the new rules adopted by the French Code, which, however, does not expressly touch the point in issue in this case.

On the strict interpretation of the language of the Code we are, therefore, also led to the conclusion that the divorce obtained by the Respondent in the State of New-York can have no effect here.

The Appellant is, therefore, still a married woman, and could only bring an action against her husband to recover her *dot* on being thereto authorized in the manner required by law. (Arts. 176 and 178 of the Civil Code.)

This authorization is more specially required when a woman under coverture wishes to institute judical proceedings against her husband. (Guyot Rep. vo. Autorization section 7 No. 16, p. 844, 4 al.)

The want of such authorization constitutes a cause of nullity which nothing can cover, says Art. 183 of the Code, Pothier. Puissance maritale, No. 74.

Duranton, vol. 2, No. 515, says:—" Dans l'ancienne jurisprudence le défaut d'autorisation produisait une nullité absolue, qui pouvait être invoquée aussi bien par celui qui avait traité avec la femme, que par elle et son mari, du moins tel était le sentiment commun des auteurs, aujourd'hui la nullité est seulement relative."

Notwithstanding this change in the law it has been repeatedly held under the Code that the want of authorisation could be invoked at any stage of the procedure, even in Appeal. Sirey, Code annoté Art. 215, Nos. 44, 45 and 46, cites these arrêts.

Our Code differs somewhat both from Article 224 of the Custom of Paris, and from Article 215 of the French Code with regard to the necessity of the authorisation required by the wife to *ester en justice*; and therefore in deciding the present case particular attention must be given to the stringent terms of our Code, and in doing so we have come to the conclusion that the Respondent could not bring the present action without a previous authorization from a judge and that the objection was well taken by the Appellant.

The majority of the members of the Court are, therefore, of opinion that the action of the Respondent should be dismissed on the two grounds that the pretended divorce cannot be recognised here and that she has not been authorised to bring her action. (JUDGES MONK & CROSS, *dissenting.*)

Judgment reversed.

Kerr & *Carter*, for the Appellant.

E. Lafleur, for the Respondent.

QUEBEC, 8 OCTOBRE 1883.

Coram DORION, juge en chef, RAMSAY, TESSIER, CROSS & BABY, J. J.

DAME HÉLÈNE BÉLANGER & VIR,

APPELANTS;

&

J. F. TALBOT, INTIMÉ.

JUGÉ :—1° Qu'une femme commune en biens, à qui son père a cédé une créance mobiliaire, ne peut, même avec l'autorisation de son mari, porter, en son propre nom, une action pour recouvrer la créance cédée, qui appartient à la communauté. 2° Que la créance pour laquelle l'action a été portée n'est pas prouvée, et que le témoignage du cédant seul ne suffit pas pour prouver la créance qu'il a cédée.

DORION, juge en chef. — L'Appelante, Hélène Bélanger, femme Martineau, en son propre nom, mais avec l'autorisation de son mari, réclame de l'Intimé, légataire universel de feu Marie Charlotte Blais, veuve Caouette, en vertu d'un transport que son père François Xavier Bélanger lui a fait, une somme de $200 due au cédant par Madame Caouette, partie pour argent prêté et partie pour ouvrages.

L'Appelante n'a pas poursuivi comme séparée de biens. Elle n'allègue pas non plus qu'elle le soit. Elle est censée s'être mariée sous le régime de la communauté, (art. 1260 C. C.) et la créance mobiliaire qui lui a été cédée, pendant la communauté, fait partie des biens de cette communauté. (art. 1272 C. C.)

Le mari, comme chef de la communauté, a seul le droit de poursuivre le recouvrement des créances de la communauté. excepté dans quelques cas spéciaux, et la femme ne peut, même avec autorisation, exercer des droits qui n'appartiennent qu'au seul chef de la communauté. Pigeau, T. 1, p. 73, dit à ce sujet :

" La femme commune en biens n'a recours à cette autorisation que pour ce qui regarde ses biens seulement ; à l'égard de ceux de la communauté, quoiqu'elle y ait sa part, *le mari est un administrateur absolu ;* quelque négligent qu'il soit sur les intérêts de cette communauté, la femme ne peut se faire autoriser à les poursuivre en sa place ; elle a seulement le droit de demander la séparation, si cette négligence est telle

Dame Bélanger & J. F. Talbot.

qu'elle entraîne la ruine de la communauté, et donne lieu de craindre la perte des biens mobiliers de la femme."

Pothier, *Communauté*, nº 473.

De plus, l'Appelante n'a pas prouvé sa créance. Elle invoque, comme commencement de preuve par écrit, une indication de paiement faite dans un acte de vente, que Madame Caouette a consenti à l'Intimé sans aucune mention de la cause de cette indication de paiement, qu'elle a depuis révoquée.

L'Appelante a en outre produit deux témoins. L'un d'eux est François Xavier Bélanger, son père et son cédant, et l'autre est Hubert Blais, à qui Madame Caouette a chargé l'Intimé de payer $200, par le même acte de vente que celui par lequel elle l'a chargé de payer $200 à Bélanger.

Ces témoins sont tous deux intéressés; Bélanger est le cédant et Blais admet qu'il a aussi une créance contre l'Intimé, comme représentant Madame Caouette. Ce dernier ne prouve pas la créance de Bélanger. Il n'y a réellement que Bélanger qui établisse sa propre créance contre l'Intimé.

La Cour de première instance a été d'opinion qu'il n'y avait pas de commencement de preuve par écrit pour autoriser la preuve testimoniale; nous disons qu'en supposant qu'il y aurait un commencement de preuve par écrit, la preuve testimoniale est tout à fait insuffisante pour faire condamner l'Intimé à payer la somme réclamée.

Il serait extrêmement dangereux de reconnaître qu'au moyen d'une cession de sa créance, une partie peut, non seulement devenir un témoin compétent, ce qui n'est pas nié ici, mais encore, que son témoignage seul suffit pour établir, après la mort de son débiteur, une créance datant de plusieurs années et pour obtenir, contre ses représentants, un jugement pour un montant qu'il lui serait libre de fixer lui-même.

Le jugement de la Cour de première instance doit être confirmé : 1° parce que l'Appelante n'avait pas le droit de porter l'action et, 2° parce qu'elle n'a pas prouvé sa créance.

Jugement confirmé.

L'Hon. F. Langelier, pour l'Appelante.

J. G. Bossé, C. R., pour l'Intimé.

MONTRÉAL, 23 JANVIER 1884.

Coram DORION, J. C., RAMSAY, TESSIER, CROSS, BABY, JJ.

No. 594.

JEAN DE LA CROIX JOSEPH COMTE,

Défendeur en Cour inférieure

APPELANT ;

&

DAME A. MEUNIER DITE LAGACÉ & VIR.

Demandeurs en Cour inférieure

INTIMÉS.

JUGÉ :—1° Que l'obligation imposée par un testateur à son neveu et son légataire universel, de pourvoir en bon frère aux besoins nécessaires d'Antoine Comte, son frère, de son épouse et de son enfant issu d'un précédent mariage, doit être interprétée d'après l'ensemble des dispositions du testateur et la condition des parties ; et, que dans l'espèce, cette charge constitue un legs d'aliments indéterminé, dont la quantité doit être réglée d'après la fortune du légataire universel et l'état et la condition des personne à qui les aliments sont dus.

2° Que, vu que l'Intimée a qui sont dus ces aliments est remariée en secondes noces, et que les arrérages d'aliments réclamés tombent dans la communauté, l'action aurait dû être portée par son mari comme chef de la communauté, ou par l'Intimée et son mari, et non par l'intimée seule.

3° Que cette objection n'ayant été faite qu'en appel, la Cour peut renvoyer le dossier à la Cour de première instance, pour permettre au mari, qui est déjà dans la cause pour autoriser sa femme, à devenir partie principale, soit par intervention ou par amendement.

DORION, J. C.—L'Appelant, qui était défendeur en Cour de première instance, appelle d'un jugement rendu par l'honorable juge Loranger le 30 septembre 1882, qui l'a condamné à payer à l'Intimée, épouse de Joseph P. Spénard, comme pension alimentaire et d'avance, une somme de $400 par année à compter du 18 octobre 1880, et, en outre, $400 pour arrérages de cette rente échus du 18 octobre 1880 au 18 octobre 1881.

Cette pension alimentaire est réclamée par l'Intimée, en son propre nom, mais autorisée de son mari, avec qui elle est en communauté, de l'Appelant qui est le légataire universel de feu Benjamin Comte, son oncle décédé.

Le testateur, par un codicile fait le 19 décembre 1875, a chargé l'Appelant " de pourvoir en bon frère aux besoins né-" cessaires d'Antoine Comte, son frère, de son épouse et de " son enfant issu d'un précédent mariage."

Jean de la Croix Joseph Comte. & Dame A. Meunier dite Lagacé.

Benjamin Comte est décédé peu de temps après avoir fait ce codicile. Antoine Comte et l'enfant issu de son premier mariage dont il est question dans le legs sont aussi décédés. L'Intimée, veuve en premières noces d'Antoine Comte, leur a survécu, et l'Appelant, en exécution du legs dont il était chargé, lui à payé chaque année une somme de $400 pour subvenir à ses besoins nécessaires, et ce jusqu'au 18 octobre 1880, date de son mariage avec Spénard, son mari actuel.

Depuis, l'Appelant a refusé de payer cette somme, alléguant que l'Intimée, étant remariée, n'avait plus besoin de cette pension, vu que son mari était en état de pourvoir à ce qui lui était nécessaire pour vivre.

Le savant juge qui a décidé la cause en première instance, fesant la distinction entre les aliments qui sont dus en vertu de la loi à un parent sans ressources et ceux qui sont donnés ou légués par un testateur, a décidé que l'intention du testateur était de faire à son neveu, à sa femme et à son enfant, un legs d'aliments payable à tout événement et sans condition, tant qu'ils vivraient, et non pas de lui faire un legs qui pourrait varier d'année en année ou cesser tout à fait, suivant les conditions de fortune dans lesquelles se trouveraient ses légataires.

Nous croyons que ce que le testateur a voulu, c'est que l'Appelant donnât à son frère Antoine, à son enfant et à l'Intimée ce qui serait nécessaire pour les faire vivre leur vie durant, suivant leur état et condition. Bourjon, T. 2, p. 354 nº 8, nous dit, que dans un cas semblable, le testateur a voulu pourvoir aux besoins du légataire suivant les biens du testateur et les besoins du légataire.

Il est prouvé qu'avant le mariage de l'Intimée, l'Appelant lui payait $8.00 par semaine ou $16 par année de plus que l'Intimée ne réclame par son action, en sorte que l'estimation de ce qui était nécessaire à l'Intimée a été reglée par l'Appelant lui-même.

Nous croyons aussi, avec la Cour de première instance, que si le legs dépendait du plus ou moins de ressources de l'Intimée, elle n'aurait pas perdu tout droit à des aliments par son convol en secondes noces, parce qu'il est prouvé que ce que son mari gagne n'égale pas la pension que l'Appelant lui payait avant son mariage, et cette pension pourrait seulement subir quelque réduction.

Sur le mérite nous croyons que le jugement de la Cour de première instance est bien fondé.

Mais l'Appelant a soulevé la prétention devant cette Cour, que la créance réclamée tombait dans la communauté, et, que l'intimée n'avait aucun droit de porter cette action, qui appartenait à son mari seul, comme chef de la communauté.

Sur ce point, les autorités ne laissent aucun doute.

Pothier, de la Communauté, nº 473, dit: Le mari étant, en sa qualité de chef de la communauté, seul seigneur des biens de la communauté, tant qu'elle dure, la coutume a très bien déduit la conséquence qu'il est seigneur pour le total des actions mobilières de sa femme, et qu'il peut *seul* les déduire en jugement."

Et plus loin. "Quand même ces actions auraient été intentées par la femme ou contre elle avant son mariage, elles ne peuvent plus, après son mariage, être poursuivies par elle ou contre elle seule, il faut que l'instance soit reprise par le mari ou contre le mari."

Même chose dans l'introduction au tit. 10 de la coutume d'Orléans, nº 129. Ed. Bugnet.

Pigeau, T. 1, p. 73. "La femme commune en biens n'a recours à cette autorisation que pour ce qui regarde ses biens seulement; à l'égard de ceux de la communauté, quoiqu'elle y ait sa part, le mari est un administrateur absolu; quelque négligent qu'il soit sur les intérêts de cette communauté, la femme ne peut se faire autoriser à les poursuivre à sa place; elle a seulement le droit de demander la séparation, si cette négligence est telle qu'elle entraîne la ruine de la communauté et donne lieu de craindre la perte du mobilier de la femme."

L'art. 1298, C. C. a adopté cette règle, comme on peut le voir au 5e rapport des commissaires, p. 212. On y lit. "Il (le mari) peut seul porter les actions qui dépendent de la communauté."

Lamoignon, Tit. 32, art. 67-68-69.

Cette question a déjà été jugée dans ce pays, par la Cour de révision, le 31 décembre 1881 dans une cause de Wright & Wright et par cette Cour dans une cause de Bélanger & Talbot, jugée à Québec le 8 octobre 1883. (1)

(1) *Ante* p. 317.

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L'on a prétendu qu'il s'agissait ici du droit même aux aliments, et que, par conséquent, la femme à qui ce droit appartient pouvait intenter l'action, mais ce droit n'est qu'un droit aux arrérages échus, et ces arrérages tombent dans la communauté. L'action aurait donc dû être portée par le mari. Mais il a été décidé que le mari et la femme pouvaient conjointement porter une action concernant les biens de la communauté. Voir Bertrand & ux./& Pouliot, 4 Quebec Law Rep. p. 8, et nous ne voyons aucune objection à cela. La seule difficulté est donc que le mari, qui est en cause pour autoriser sa femme, aurait dû figurer dans l'action comme partie principale. Nous croyons qu'on peut remédier à cette omission en renvoyant le dossier à la *Cour de première instance* avec permission au mari de l'Intimée de se porter partie demanderesse avec l'Intimée, soit en amendant la déclaration ou par une demande en intervention.

Le jugement renvoie le dossier à la Cour supérieure pour régulariser la procédure, chaque partie payant ses frais, ceux de la Cour de première instance réservés.

Jugement confirmé.

Mercier, Beausoleil & Martineau, pour l'Appelant.
Laflamme, Huntington & Laflamme, pour l'Intimée.

QUEBEC, 7th DECEMBER 1883.

Coram DORION, C. J., RAMSAY, TESSIER, CROSS, BABY, JJ.

THE QUEBEC WAREHOUSE COMPANY,

Defendants in the Court below

APPELLANTS;

&

THE CORPORATION OF THE TOWN OF LÉVIS,

Petitioners for a Writ of Injunction in the Court below

RESPONDENTS.

HELD:—That the Act 44-45 Vict., ch. 40, section 2, providing that "if within thirty days from the sanction of said Act, the Corporation of Lévis furnished to the Quebec Central Railway Co. a valid guarantee to pay the cost of expropriation over $30,000, the Company would be obliged either to adopt the route indicated and erect the station described in the statute, or to pay a sum of $50,000" authorised the Corporation of the town of Lévis to pass the by-law necessary to give such guarantee.

The Quebec Warehouse Co. & The Corporation of the Town of Lévis.

DORION, C. J.—In the session of the Local Legislature held in the year 1881, the Quebec Central Railway Company obtained an amendment of their Charter, 44-45 Vict., ch. 40. By section 2 of this amending act it is provided that :

" In constructing said line, the said Company shall be " bound to continue from the present terminus of the said " Lévis and Kennebec Railway, in the parish of Notre-Dame " de Lévis, into Notre-Dame ward in the town of Lévis, and " erect a station there, thence traversing Lauzon ward, in " the said town of Lévis, and the villages of Bienville and " Lauzon, to arrive at deep water in said Lauzon ward; " provided that within thirty days from the sanction of the " present act, the Corporation of the town of Lévis furnishes " the said Company with its valid guarantee and obligation " to pay all excess over thirty thousand dollars of the cost of " expropriation, for the right of way upon the said described " route, in so far as said route traverses the parish of Notre- " Dame de Lévis, Notre-Dame and Lauzon wards, in the " town of Lévis, and the village of Bienville and Lauzon, " following the brown line shown on the plan of the said " Company, to be deposited for reference in the Public Works " Department of this Province, to the point of intersection " with the red line upon said plan; and in default of said " guarantee and obligation being so furnished, the said " Company shall be relieved of the obligation to adopt the " route and erect the station described in this section, " and shall have the right to avail itself of the provi- " sions of section one of this act; and provided, further, " that in the event of said guarantee and obligation being " furnished, as hereinbefore mentioned, the said Company " shall be relieved of the obligation to adopt the route " and erect the station described in this section and shall " have the right, within one year from the sanction of the " present act to avail itself of the provisions of section one " of this act, upon paying to the Corporation of the town of " Lévis the sum of fifty thousand dollars before commencing " the work of construction."

Upon the passing of this act the council of the town of Lévis passed a by-law in accordance with the above provision guaranteeing to pay to the Company the whole cost of expro-

The Quebec Warehouse Co. & The Corporation of the Town of Lévis.

priation for the right of way for the extension of the railway over and above $30,000.

The Respondents, who are rate payers of the town of Lévis, have applied for a writ of injunction, to restrain the Corporation from further carrying on the by-law, and the Quebec Central Railway from accepting the guarantee purporting to be given by it.

The grounds upon which the Respondents claim that the by law is illegal are : 1st because it refers to the length and width of the property to be expropriated according to a plan existing at the time of the passing of the said act, which plan is not referred to in the act. ; 2nd because there is no law authorising the corporation to pass such by-law; 3rd because it involves the corporation in an unlimited liability.

There is really nothing in the first objection. The amending act was predicated upon certain plans exhibited, at the time the Company sought an extension of their powers, and although not mentioned in the act, they must be considered as the basis of the amending act. In addition to this, it may be said that the restriction imposed by the by law is in the interest of the rate payers and in order that the Corporation might not pledge its guarantee to an indefinite amount, but merely to furnish, in addition to the $30,000 to be paid by the Railway Co. the amount required to acquire the right of way over certain properties within certain well defined limits, and that, therefore, if complaint can be made on this head, it can only be by the Company and not by the rate payers, in whose interest this restriction has been made.

This third ground taken by the Respondents is a contradiction of their first ground. By the first, they complain that the Corporation had no right to limit their liability, while in the third they complain that their liability is left unlimited. If the legislature has thought proper to authorize the Appellants to incur an unlimited liability, the rate payers have no right to contest the authority so given. The whole question then resolves itself into whether the municipality was authorized by the amending act to pass the by-law.

It appears that the Corporation of Lévis had already granted a sum of $50,000 for the purpose of assisting the construction of the Lévis and Kennebec Railway, with a view to have the terminus of the Railway located within the town

of Lévis. The Lévis and Kennebec Railway having failed to complete their road, the Quebec Central Railway purchased the portion of the road made by the Lévis and Kennebec Railway Co., and in order to complete the road, they sought an amendment to their charter. It was in order to secure to the Corporation of Lévis the advantages of the agreement entered into with the Lévis and Kennebec Railway C° and for which they had paid $50,000, that the provision above referred to was inserted in the amending act. It is quite possible that the Corporation might have had no authority to pass the by-law complained of without the provision contained in the Quebec Central Railway amending act, but it is impossible to read the section of the act already cited, without being convinced that the legislature intended to authorise and did authorise the Corporation of Lévis to pass the said by-law.

What could the legislature mean by saying that, if within thirty days from the sanction of the act the Corporation furnished to the Company a valid guarantee to pay the cost of expropriation over $30,000, the Company would be obliged either to adopt the route indicated and erect the station described, or refund the $50,000 paid by the town of Lévis to the Lévis and Kennebec Railway? There were no means of passing any by-law within thirty days from the sanction of the act, unless such by-law was passed by the council who is the recognised organ of the Corporation.

The Respondents wish the act to be read as if the legislature had made a perfectly nugatory provision, without giving them any authority to carry on the object for which the enactment was passed. This is not the interpretation which is given to the act by the majority of the Court, and we think that this act must be interpreted in accordance with articles 12 and 17, § 16 C. C., which provide that, when a law is doubtful, it is to be interpreted so as to fulfil the intention of the legislature and to attain the object for which it was passed, and also that the authority given to do a thing carries with it all the powers necessary for that purpose, this enactment must, therefore, be considered as authorising the Corporation of Lévis to give the guarantee which was so evidently for the advantage of the municipality and, without which, the enactment would have no meaning at all.

The Quebec Warehouse Co. & The Corporation of the Town of Lévis.

For these reasons the majority of the Court are of opinion to reverse the judgment rendered by the Court below and to dissolve the injunction obtained by the Respondent. Judges Ramsay and Tessier, *dissentientibus.*

Judgment reversed.

Bossé & Languedoc, for Appellants.
Hon. George Irvine, Q. C., for Respondents.

MONTRÉAL 23 JANVIER, 1884.

Présents : SIR A. A. DORION, J.C., MONK, TESSIER, CROSS, BABY, J. J.

JOSEPH NORMANDIN

Défendeur en Cour Inférieure

APPELANT ;

&

CÉLANIRE DEROUIN (Mme. HÉNAULT)

Demanderesse en Cour Inférieure

INTIMÉE.

JUGÉ.—Que dans l'espèce, sur le 1er chef de la demande alléguant une vente, le débiteur ne peut se libérer à cause du défaut de protêt contre l'endosseur d'un billet mentionné dans un second chef de la demande pour le prix de vente ;

Que l'obtention frauduleuse du billet et sa destruction par le débiteur, feront interpréter tout doute contre lui, surtout s'il a reçu considération entière pour son obligation de payer.

Appel d'un jugement rendu en Cour de 1e instance par l'hon. juge Mathieu.

Le juge Tessier *pro curiâ :*

Si la cause était seulement fondée sur le billet promissoire dont il est question en cette cause ;

Si Joseph Normandin, l'Appelant, était une simple caution ou un garant, sans avoir reçu de considération dans le contrat de vente qui est allégué, le jugement rendu ne serait pas confirmé ; mais les allégations de la demande et les faits prouvés établissent que Normandin a été partie au contrat de vente et qu'il a reçu considération.

En juin 1876, Chauvin et Derouin se rendirent à Saint Cuthbert et entrèrent en négociation avec Madame Hénault, pour acheter le foin sur 60 arpents de terre, à raison de $500,

mais Madame Hénault ne voulut pas conclure le marché avant d'avoir des sûretés, et elle s'adressa à M. Fauteux, résidant à Montréal, qui vendit en même temps le foin sur sa terre voisine à raison de $279, mais il s'assura que Normandin serait responsable, il prit un billet des deux parties, Chauvin prometteur, Derouin premier endosseur, et Normandin, second endosseur pour $500, afin de garantir le paiement des deux ventes se montant à $779 en tout.

Il est prouvé que Normandin s'est rendu à Saint-Cuthbert, qu'il a fait faucher le foin sur ces terres, qu'il a payé les hommes, même ses prétendus associés, comme s'ils étaient à la journée à son emploi ; il a vendu le foin à Montréal et a retiré l'argent en fesant son affaire et devenant le principal obligé.

Le foin étant transporté à Montréal, Fauteux exige le paiement comptant sur l'excédant de $500, Mme Hénault avait reçu $100 comptant, Fauteux reçoit par un autre billet négociable $119, de sorte qu'il restait dû à M. Fauteux $279, à Mme Hénault, $221 ; c'est cette dernière somme qui est réclamée en cette cause.

En septembre 1876, M. Fauteux fait poursuivre Chauvin et Derouin pour le prix de son foin $279, en offrant de remettre le billet de $500 servant de garantie à cette double vente. Normandin se présente et paie ce montant de $279 pour M. Fauteux, à son avocat, M. Charpentier. Celui-ci hésite à remettre à Normandin ce billet de $500, vu qu'il est pour un montant plus élevé que ce qui est dû et payé à Fauteux. Normandin représente que ce billet n'est que pour garantir la dette de Fauteux, il obtient le billet de $500 et, rendu chez lui, le jette au feu. Ceci est un procédé frauduleux de la part de Normandin.

Mme Hénault, à qui il restait dû une balance de $221, poursuit Normandin, en alléguant la vente de son foin à ces trois individus, Chauvin, Derouin et Normandin, et allègue aussi le billet en question donné en garantie, en ajoutant que Normandin a obtenu et détruit frauduleusement le dit billet.

Normandin objecte :

1o Une société.

2o Que le billet dont il était endosseur n'a pas été protesté à son échéance.

Sur le point de la société, s'il y avait société, l'associé Nor-

Jos. Normandin & Célan. Derouin.

mandin pouvait être poursuivi seul, parce qu'il n'y a pas eu d'enregistrement de cette société ; mais il est en preuve qu'il n'y avait pas de société, mais c'est l'obligation de trois individus dans un achat en commun, c'est une obligation *in solido*.

Il est vrai que Chauvin et Derouin sont entrés en négociation pour acheter le foin en question, mais la vente et livraison du foin a été en réalité faite à Normandin. Il est prouvé que c'est Normandin qui a fait faucher le foin, qui l'a fait transporter à Montréal, et qui, seul, a reçu le produit de la vente. Ce n'est tout au plus que ce qu'on appelle quelque fois *a joint adventure*, une acquisition en commun.

Normandin a eu considération, c'est lui qui a payé les acomptes, il doit payer la balance réclamée.

Sur le 2nd point que le billet n'a pas été protesté, il faut admettre en principe général que l'absence ou la perte du billet ne dispense pas du protêt contre l'endosseur, mais le billet n'est pas une novation de la dette, qui est alléguée dans cette instance sous la forme d'une vente.

Il appert qu'en septembre 1876, deux mois après la vente et livraison du foin, Fauteux fit poursuivre Chauvin & Derouin pour $279, étant sa part dans cette vente, mais en offrant de remettre le billet de garantie de $500. Normandin se présenta à M. Charpentier, avocat de Fauteux et paya les $279. M. Charpentier hésita à remettre le billet de $500 à Normandin, mais celui-ci représentant qu'il n'avait donné ce billet que pour garantir la dette de Fauteux, obtint la remise de ce billet frauduleusement, l'emporta chez lui et, le même jour, le jeta au feu. Cet artifice rejète la faute, s'il y a incer titude sur la forme du billet. D'après la déclaration le billet était échu, mais si le Défendeur peut être condamné sur le premier chef, il n'a pas à se plaindre. En loi et en équité le défendeur Normandin est justement condamné à payer à Mme Hénault la balance de $221, et le dispositif du jugement est confirmé avec dépens.

Jugement confirmé.

Robidoux & Fortin, pour l'Appelant.

Laflamme, Huntington & Laflamme, pour l'Intimée.

MONTRÉAL, 21 DÉCEMBRE, 1883.

Coram DORION, Juge en chef, RAMSAY, TESSIER, CROSS, BABY, JJ.

No. 321

ALFRED NORMANDIN,

DEMANDEUR, APPELANT;

&

PHILOMÈNE NORMANDIN ET JOS. C. ARNOIS, son mari,

DÉFENDEURS;

&

LES RELIGIEUSES CARMÉLITES D'HOCHELAGA

MISES EN CAUSE, INTIMÉES.

JUGÉ :—Que l'annulation d'une vente ou donation d'un immeuble, pour cause de fraude, n'atteint pas l'hypothèque consentie à un tiers de bonne foi, lorsque l'emprunteur possède le dit immeuble en vertu de titres parfaits à leur face et n'indiquant aucun signe apparent de nullité.

Le juge Tessier :

L'Appelant Alfred Normandin, créancier de la succession de son père feu Constant Normandin, a porté une action demandant l'annulation, comme frauduleux :

1° D'un acte de vente d'un immeuble de cette succession par Philomène Normandin et son mari, Joseph C. Arnois, à Charlotte Normandin, leur tante, du 26 mai 1880.

2° D'un acte de donation de cet immeuble, par la dite Charlotte Normandin, au dit Jos. C. Arnois du 28 mai, 1880.

La Cour supérieure a accueilli cette demande et prononcé les actes nuls.

La Cour de révision a prononcé dans le même sens ces actes nuls, mais elle a adjugé sur un point qui avait été omis par la Cour de 1ère instance, c'est-à-dire, de déclarer la validité d'une hypothèque de $500 que le possesseur et donataire de l'immeuble en question, Jos. C. Arnois, avait consentie à Réné Dupré, maintenant représenté par les Carmélites.

C'est de cette partie du jugement de la Cour de révision que le demandeur Alfred Normandin se plaint, et qu'il soumet à l'examen de cette Cour par le présent appel.

Le premier grief consiste à dire que les Cours de première instance et de révision n'étaient pas appelées à se prononcer sur ce point.

Alfr. Normandin & Phil. Normandin et J. C. Arnois, son mari. & Les Carmélites d'Hochelaga.

L'Appelant a mis en cause, comme défendeur, le créancier Dupré représenté par les Carmélites, et, dans sa demande, il allègue " qu'Arnois, dans le but d'embarrasser son recours " sur le dit immeuble, l'a hypothéqué en faveur de René " Dupré pour une somme de $500, et conclut à ce que le dit " René Dupré soit assigné pour voir déclarer les dits actes " frauduleux et nuls."

Le dit René Dupré étant mort durant l'instance, les religieuses Carmélites, ses légataires universelles, reprirent l'instance et plaidèrent, entr'autres choses, que les actes en premier lieu cités étaient, tout au plus, seulement annulables et que leur annulation ne pouvait entraîner la nullité de l'hypothèque consentie à un tiers de bonne foi, à René Dupré, par Joseph Chs. Arnois, qui possédait publiquement l'immeuble en vertu de titres dûment enregistrés, qui n'indiquaient à leur face aucun défaut, ni signe apparent de nullité.

Le Demandeur a lié la contestation sur ce point et a prétendu que le jugement à intervenir ne lierait pas le créancier hypothécaire, René Dupré, représenté par les Carmélites. Le contraire semble évident; étant appelé, assigné et mis en cause, Réné Dupré aurait eu à rencontrer plus tard l'exception de chose jugée à l'égard de son hypothèque.

Les autorités suivantes démontrent cette proposition.

2 Laurent 121 : "Si l'on ne peut pas opposer la chose jugée " à ceux qui n'ont pas été parties en cause, c'est parce qu'ils " n'ont pu soutenir leur droit ; mais s'ils y ont été appelés et " s'ils ont négligé de prendre des conclusions, ils ne peuvent " pas se plaindre, il ne tenait qu'à eux de défendre leur droit, " ils ont négligé de le faire; ils doivent supporter les consé- " quences de leur négligence. L'esprit de la loi demande " qu'on puisse leur opposer le jugement qui est rendu, quoi- " qu'ils n'aient pris aucune part au litige. La loi veut que " les procès aient une fin; c'est pour n'être pas exposées à " renouveler un débat que les parties y appellent ceux qui " pourraient avoir intérêt à contester la décision; s'il dé- " pendait de ceux qui sont mis en cause de ne pas intervenir " au débat, en s'abstenant de prendre des conclusions, le but " que le législateur a eu en vue ne serait pas atteint.

" Il y a un arrêt de la cour de cassation en ce sens : elle a " décidé qu'un jugement a l'autorité de chose jugée contre " toute partie appelée dans l'instance, alors même qu'il serait

Alf. Normandin & Phil. Normandin et J. C. Arnois, son mari. & Les Carmélites d'Hochelaga.

" intervenu sur un débat auquel elle est demeurée étrangère ; " étant présente au procès ou appelée, c'est à elle de faire " valoir ses moyens, si elle veut empêcher qu'on ne lui op- " pose le jugement qui interviendra." (Rejet, 21 mai 1855. Dalloz, 1856, 1, 258.)

Le même auteur, parlant de l'action en résolution, t. 24, p. 347, établit le même principe, quoique pour un cas différent : " Le vendeur agira prudemment en mettant en cause le tiers " acquéreur ; le même jugement prononcera tout ensemble " sur la résolution des droits de l'acquéreur et sur la réso- " lution des droits du sous-acquéreur."

5 Proudhon, 211.

2 Paul Pont, p. 46, nº 677 (11 Marcadé.)

Le Journal du Palais pour 1876, pp. 1241, 1242, 1243 et 1244, rapporte une cause analogue de sieur Sirotteau-Fontaine, créancier des époux Rédeau.

Sur le second point, il s'agit de savoir si Réné Dupré ayant, de bonne foi, acquis une hypothèque pour bonne considération, cette hypothèque est valide ou non.

Il faut se rappeler que Constant Normandin est décédé le 7 mars 1877.

Les autres héritiers ayant renoncé à la succession, Philomène Normandin, épouse de Joseph C. Arnois, a accepté cette succession.

Le 26 mai 1880, Philomène Normandin et Joseph C. Arnois vendent l'immeuble dépendant de la succession à Charlotte Normandin pour valable considération, dont partie due antérieurement à l'acquéreur, et à charge de payer d'autres dettes.

Le 28 mai 1880, Charlotte Normandin fait une donation de cet immeuble à Jos. C. Arnois, à la charge de la loger, nourrir et vêtir et payer d'autres créanciers.

L'Appelant Alfred Normandin attaque ces actes et prétend que la vente du 26 mai n'a été faite à Charlotte Normandin, que comme à une personne interposée pour favoriser indirectement la donation faite à Arnois, mari de Philomène Normandin, qui ne pouvait, par la loi, donner à son mari cet immeuble durant le mariage.

Il est admis que ces actes sont entachés de fraude, et ils ont été annulés, tant par le jugement de la Cour de première instance, que par la Cour supérieure siègeant en révision. Il n'y a pas d'appel sur ce point.

Alfr. Normandin & Phil. Normandin et J. C. Arnois, son mari. & Les Carmélites d'Hochelaga.

L'appel porte sur le point de savoir si l'annulation de ces actes emporte l'annulation de l'hypothèque consentie par Arnois à Réné Dupré, le 2 juillet 1880, dument enregistrée.

Il est prouvé que Dupré a été de bonne foi et qu'il a fourni valeur pour cette hypothèque à Arnois, qui était alors possesseur et propriétaire de l'immeuble, en vertu d'un titre bon à sa face, dument enregistré, qui était annulable, mais non pas radicalement nul pour aucune cause apparente, c'est-à-dire, la donation de Charlotte Normandin à son neveu, Joseph C. Arnois.

Cette donation n'a été annulée, que sur la preuve extrinsèque de l'état d'insolvabilité des contractants et de l'interposition frauduleuse, mais ces faits étaient inconnus au créancier Dupré. C'est là la distinction que font les auteurs.

Solon, vol. 2, No. 149, dit :

" 149...... L'équité... va... indiquer la différence qu'il y a entre les parties desquelles émane l'acte nul, et les tiers qui y étaient étrangers...

" On concevra... que si...... les contractants enfreignent les dispositions de la loi, leurs engagements doivent être annulés. Ils ne seront pas reçus à se plaindre des conséquences d'une peine qu'ils ont volontairement encourue et qui n'est que le résultat de leur désobéissance."

" Mais ce reproche, continue Solon, ne peut point être " adressé au tiers qui, sur la vue d'un titre ayant toutes les " apparences de la réalité, traite de bonne foi avec un injuste " possesseur, et remplit à son égard toutes les formalités que " la loi prescrit. Il eût été injuste d'évincer ce tiers dans toutes " les circonstances, pour des causes qu'il n'a point connues, et " que la loi ne l'avait pas mis à même de connaître. Une " pareille éviction serait, le plus souvent, dangereuse; sa pos-" sibilité et l'écueil caché qui serait renfermé dans tous les " actes anéantiraient la confiance qui doit régner dans les " conventions et dans leur stabilité, et dès lors, les incon-" vénients les plus graves seraient la conséquence de la loi " qui autoriserait, d'une manière absolue, la maxime :...... " *Resoluto jure dantis resolvitur jus accipientis.*"

Cette même doctrine a été maintenue dans la cause de Sirotteau-Fontaine déjà citée, *journal du Palais* de 1876, page 1241 et dans celle de Devillard et Guittet et Grosborne, *journal du Palais* de 1879, page 111.

Alfr. Normandin & Phil. Normandin et J. C. Arnois, son mari, & Les Carmélites d'Hochelaga.

L'article 774 de notre Code civil indique ceux qui, dans une donation, sont réputés personnes interposées, ce sont les ascendants et les descendants et l'héritier présomptif, à l'époque de la donation.

Ce n'est pas le cas dans la cause actuelle, parce que la donation est par la tante au neveu par alliance.

La présomption d'interposition n'existant pas, il a fallu en faire une preuve externe pour rendre l'acte annulable, parcequ'il n'était pas nul de plein droit.

On trouvera dans une cause de Ouellet et Rochette, décidée en Cour de révision à Québec, dernièrement, vol. 9, page 289, Rapports judiciaires de Québec, des observations et des autorités qui peuvent s'appliquer à la cause actuelle.

Cette Cour en est donc venue à la conclusion unanime de confirmer le jugement en cette cause avec dépens, c'est-à-dire, de maintenir la validité de la créance hypothécaire des révérendes religieuses Carmélites d'Hochelaga représentant feu Réné Dupré.

Jugement confirmé.

Béique, McGoun & Emard, pour l'Appelant.
Longpré & David, pour les Intimés.

MONTREAL, 25 JANUARY, 1884

Coram DORION, C. J. MONK, RAMSAY, CROSS & BABY, J. J.

DENIS TANSEY,

Contestant in Court Below,

APPELLANT;

&

S. BETHUNE ET AL.,

Creditors Collocated,

RESPONDENTS.

HELD.—That the party suing out an execution, whether he is the Plaintiff or the Defendant in the cause, is entitled to be collocated by privilege out of the proceeds of the immoveable property sold, not only for the costs of the execution, but also for the costs incurred on the judgment on which the execution issued —RAMSAY J., *dissentiente*.

In an action by Bernard Emerson against Adam Darling and others, the Respondents, who represented the Defendants, obtained distraction of costs, and issued an execution under which the immoveable property of Emerson were sold.

Denis Tansey, & S. Bethune et al

On the return of the price of sale by the Sheriff, the Respondents were collocated, by privilege, for the full amount of their costs taxed on the judgment dismissing Emerson's action. Their collocation has been contested on the ground, that the costs of a Plaintiff were alone privileged and not those incurred by a defendant.

The Court below rejected the contestation. Hence the appeal.

Dorion, C. J.—In France, the only costs that were held to be privileged and were collocated as such, were the costs of execution which were necessary to bring the property to sale. These costs were considered to be made in the interest of all the creditors.

The same rule was for a long time followed in the District of Montreal. A different practice seems to have prevailed in the District of Quebec, where the seizing creditor was collocated by privilege for his costs taxed as in a non contested action, on the ground that there being here no *exécution parée*, as in France, it was necessary to obtain a judgment to seize a debtor's property, and that the costs of such a judgment were as much in the interest of all the creditors as the costs of execution were. (The Eastern Townships Bank and Pacaud, 17 L. C., Rep. 126.)

The code of procedure, by art. 606, established a certain order of preference among privileged costs, those of seizure and sale being the first, and those of the plaintiffs suit, taxed as in an uncontested case not inscribed for proof, being the eighth and last in the order of privileged costs. Art. 728 of the same code contains a slightly different provision, as to the payment of privileged costs out of the proceeds of real estate, costs of suit, as provided by art. 606, being placed under paragraph 7 of this last article.

By the Act 33, Vict., c. 17, Quebec, all the words after "costs of suit" were struck out of the eighth paragraph of art .606 of the Code of Civil Procedure, which paragraph as amended reads thus:—"*The Plaintiff is next paid his costs of suit.*"

The Commissioners in their report on the Code of Procedure, p. 21, make the following observations concerning art. 606, and say:—"An additional paragraph suggested to "art. 606 is intended to settle the practice, which varies in

" the different districts, with respect to the preferential rank " of costs incurred by the executing creditor, in order to " obtain execution against the common debtor. In the " District of Montreal these costs are not allowed any " privilege; in the District of Quebec they are privileged up " to a certain amount. The provision suggested by the Com- " missioners gives the executing creditor a privilege for such " an amount as may be taxed in an uncontested suit, with " preference over all other creditors."

It is plain that the intention was to give a preference to the executing creditor, whether he was the plaintiff or the defendant, and that the word plaintiff in the article must be read as plaintiff on the execution.

Since a judgment is required to cause the sale of a debtor's property, it is indifferent whether that judgment is obtained by a plaintiff or by a defendant, as in both cases, the sale is for the benefit of all the creditors; and hypothecary creditors cannot complain that they are prejudiced by the collocation of a judgment creditor for his costs, since they would have had to incur those costs themselves, if it had not been done by another creditor. The motive of the preference applies therefore equally to all judgment creditors at whose suit the property is realised, whether they were plaintiffs or defendants.

The hypothecary creditors may, however, suffer from the amendment which has allowed a privilege to an unlimited amount of costs, instead of those absolutely necessary to bring the property to sale as was provided by art. 606, c. c. p., but the Legislature having, by the Act 33 Vict., c. 17, laid down a general rule applicable to all cases, we cannot make a distinction, and the judgment of the Court Below is confirmed.—RAMSAY J., *dissentiente.*

J. Calder, for Appellant.

Messrs. Bethune & Bethune, for Respondent.

MONTREAL, 21 DECEMBER, 1883.

Coram DORION. C. J., RAMSAY, TESSIER, CROSS, BABY, J. J.

No. 586.

THOMAS LOGAN,

APPELLANT;

&

JAMES KILGOUR,

RESPONDENT.

Distraction of costs was awarded to the Appellant's Attorney by a judgment of the Circuit Court. This judgment was confirmed in appeal with costs to the Appellant.

HELD: — *Ramsay J. dissentiente.* 1o. That to an execution by the Appellant, the Respondent could oppose, in compensation, a claim he had against the Appellant's Attorney to the extent of the costs in the Circuit Court, for which distraction of costs had been allowed, but not for those in appeal, which were awarded to the Appellant.

2o. That Appellant could not join to an app al from a judgment in review, an appeal from the original judgment in the Circuit Court, from which he had not appealed within the delay fixed by art. 1143, *C. C. P.*

On the 16th of December, 1878, the Appellant obtained a judgment in the Circuit Court, maintaining an opposition *afin de distraire* with costs against the Respondent, of which distraction was awarded to Messrs. Felton and Calder, his Attornies. At the time this judgment was rendered, Mr. Calder alone represented the Appellant, Mr. Felton having died pending the proceedings. The judgment of the 16th of December, 1878, was confirmed in appeal, with costs, in favour of the Appellant, who issued execution, as well for the costs in the Court below as for those in appeal.

The Respondent filed an opposition alleging that he had paid $30 on an order of Mr. Calder, to whom the costs were due, and that he held a note of him for $207.50, which two sums he opposed in compensation to the extent of the costs for which the execution had been issued. The Circuit Court allowed compensation as to the costs in the Circuit Court, but not for those incurred in appeal, for which there was no judgment awarding distraction of costs. The Court of Review reversed this judgment and maintained that the whole costs, both in the Circuit Court and in Review, were compensated.

DORION, Chief Justice.—It is not sufficient that distraction of costs be demanded by the Attorney of the party entitled to

costs, but it must also be granted by the Court, otherwise the party will be entitled to recover them in his own name. (*Pothier du mandat, No.* 136-7, *art.* 482, *C. de P. C. Rolland de Villargues, Vo. dépens, No.* 44.)

In this case Messrs. Felton and Calder obtained distraction of costs in the Court below, and as at the time the judgment was rendered Mr. Calder alone represented the Appellant, we consider that he had a right to claim the payment of those costs, amounting to $68.59, and that the Respondent is entitled to oppose that the said costs are compensated by the payment he has made of the sum of $30 on the order of Mr. Calder and by so much of Mr. Calder's note, which he holds, as will suffice to pay the balance. But as Mr. Calder has not obtained distraction of costs on the judgment rendered in appeal, the Respondent, who is not a creditor of the Appellant, has no right to oppose to him, in compensation of the costs in appeal, the claim which he has against Mr. Calder, for although he may be the creditor of Mr. Calder, he is not the creditor of the Appellant (art. 1187, C. C.), and as regards these costs in appeal amounting to $93, the Appellant is entitled to recover those costs, together with all subsequent costs of execution.

This does not conflict with the case of Fournier and Morency, 7 Quebec Law, Rep., p. 9, for in that case the judgment, as entered in the register of the Court contained an adjudication of the costs in favour of the Attorney of Record, which the Court did not consider as an alteration of the judgment. The Attorney could, therefore, in that case take an execution in his own name, while in this case, there being no adjudication in favour of the Attorney, except as to the costs in the Circuit Court, Mr. Calder could not have taken an execution in his own name for the costs in appeal, and the execution was rightly sued out by the Appellant.

The judgment of the Court of Review will be reversed, and the judgment of the Circuit Court will be confirmed with costs. The Appellant will have, however, to pay the costs on the motion to dismiss his appeal from the judgment of the Circuit Court, as he has not appealed from that judgment within the delay fixed by art. 1143 of the Code of Civil Procedure.—*Judge Ramsay dissenting.*

Kerr & Carter, for Appellant.

Ives, Brown & Merry, for Respondent.

QUEBEC, 7 DECEMBRE, 1883.

Coram DORION, juge en chef, MONK, RAMSAY, TESSIER, BABY, J J.

No. 584.

THEOPHILE BUREAU,

Demandeur en Cour de 1ère Instance,

APPELANT ;

&

EDOUARD VACHON.

Défendeur en Cour de 1ère Instance,

INTIMÉ.

JUGÉ :—Qu'un propriétaire n'a pas le droit, sous les dispositions de l'Acte 19 et 20 Vict., ch. 104 (Statuts Refondus du Bas-Canada, ch. 51), d'ériger sur un cours d'eau une chaussée aboutissant sur la terre du propriétaire riverain du côté opposé de la rivière, et que ce propriétaire a le droit de demander à ce qu'une chaussée ainsi érigée soit démolie.

DORION, J. C.—L'Intimé, propriétaire d'un terrain situé au côté ouest de la rivière Montmorency, y a construit un moulin. Il a aussi fait une digue ou chaussée qu'il a appuyée sur la propriété de l'Appelant, du côté est de la rivière. L'Appelant a demandé la démolition de cette partie de la digue ou chaussée, qui a été construite sur son terrain. Son action a été déboutée. De là cet appel.

L'Intimé prétend qu'étant en possession d'un terrain qui borde la rivière, l'Acte 19 et 20 Vict., ch. 104 (ch. 51 des Statuts Refondus du Bas Canada), lui donne le droit d'y ériger un moulin ou usine et d'appuyer sa chaussée sur des propriétés qui ne lui appartiennent pas. A-t-il ce droit ?

Cette question n'est pas nouvelle. Elle a déjà été jugée deux fois à l'encontre des prétentions de l'Intimé et sous des circonstances identiquement les mêmes que celles que présente cette cause. La première de ces décisions a été prononcée par la Cour supérieure, dans une cause de Joly et Gagnon, rapportée au 9e vol. des Décisions judiciaires du Bas Canada, p. 166 :— la seconde a eu lieu dans une cause de Laterrière et Tremblay. Cette cause n'a pas été rapportée ; mais le jugement que cette Cour a prononcé en 1871, infirmant le jugement de la Cour de révision et confirmant celui de la Cour de première instance, est transcrit en entier dans le factum de l'Appelant.

Dans ces deux causes la question a été jugée après mur examen, et nous croyons qu'elle a été bien jugée.

L'Acte que l'Intimé invoque donne bien le droit, à tout propriétaire d'un terrain bordé ou traversé par un cours d'eau, d'y ériger des usines et de faire les travaux nécessaires pour les exploiter en payant les dommages qu'il peut causer ; mais il ne donne pas à celui qui veut construire une usine le droit d'exproprier les propriétaires riverains, et, si l'Intimé avait le droit d'appuyer sa chaussée sur le terrain de l'Appelant et d'y faire les travaux nécessaires, ça serait une véritable expropriation. S'il a ce droit, pourquoi n'aurait-il pas celui d'ériger son moulin chez l'Appelant, en lui payant les dommages que cela pourrait lui causer? Le fait que la Législature n'a donné qu'aux seuls propriétaires de terrains, bordés ou traversés par un cours d'eau, le droit d'y ériger des usines, démontre qu'elle n'avait pas l'intention de permettre à ceux, qui voudraient construire des moulins ou usines, le droit d'exproprier ceux dont les terrains leur seraient nécessaires, car, s'il devait y avoir expropriation, il est tout-à-fait indifférent pour celui que l'on veut exproprier, qu'il le soit par un propriétaire riverain ou par quelqu'un qui ne l'est pas, ou qu'il soit exproprié par quelqu'un qui veut construire une chaussée ou une usine chez lui.

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D'après l'article 404 du Code civil, "nul ne peut être contraint de céder sa propriété, si ce n'est pour cause d'utilité publique et moyennant une juste et préalable indemnité." Il n'a jamais été prétendu que la construction d'un moulin ou d'une usine quelconque fût une cause d'utilité publique, qui autorisait ceux qui voulaient en ériger, d'exproprier ceux dont les terrains pouvaient leur être nécessaires. Le statut que l'on invoque ne le dit pas non plus. Ce statut ne pourvoit pas au paiement d'une indemnité préalable, comme cela a lieu dans tous les cas d'expropriation forcée, et il serait tout-à-fait déraisonable de supposer, que la législature aurait voulu déposséder un propriétaire, sans lui réserver d'autre recours qu'une action en dommages. Ça serait une violation flagrante du principe consacré par l'art. 404 C. C.

D'ailleurs l'Acte 19 et 20 Vict., ch. 104, a été passé sous des circonstances qui en expliquent les dispositions. La tenue seigneuriale venait d'être abolie. Le monopole que les seigneurs avaient jusque-là prétendu exercer sur les rivières non navigables avait disparu, et ces rivières étaient déclarées appartenir aux propriétaires riverains. Chaque propriétaire

Théoph. Bureau & Fd. Vachon.

pouvait donc les utiliser ; mais il restait un inconvénient, c'est que tout propriétaire souffrant par le reflux des eaux un dommage temporaire, quelque minime qu'il fût, avait le droit de faire démolir une chaussée ou barrage quelconque, quelque fût la valeur de l'usine que ce barrage contribuait à alimenter. C'est pour prévenir ces poursuites pour la démolition de travaux importants, parce qu'ils avaient l'effet de faire refluer les eaux sur les parties basses des terrains avoisinants, que la législature a passé cette loi, qui permet à tout propriétaire d'utiliser les cours d'eaux qui bordent sa propriété en payant les dommages que ses travaux peuvent causer. Son but était de mieux assurer les droits que les propriétaires riverains avaient sur les cours d'eaux, tout en sauvegardant les intérêts des propriétaires environnants ; mais le but de la loi n'a jamais été de donner le droit d'exproprier aucun des propriétaires, dont les propriétés pouvaient être utiles ou même nécessaires à l'exploitation de moulins ou d'usines érigées par d'autres que les propriétaires. L'on voulait faciliter l'exploitation des cours d'eaux, sans cependant enfreindre les droits de propriété des propriétaires riverains, et c'est là l'interprétation que lui ont donnée M. le juge Chabot, dans la cause de Joly et Gagnon, et la Cour d'appel, dans celle de Laterrière et Tremblay. Ces décisions font autorité. Le jugement de la cour de première instance doit être infirmé. L'Intimé devra démolir la partie de sa chaussée qui est appuyée sur la propriété de l'Appelant et payer $25 de dommages. Tel est le jugement de la Cour.

Jugement infirmé.

Belleau, pour l'Appelant.

Langlois, *Larue*, *Angers et Casgrain*, pour l'Intimé.

MONTREAL, 18 JANVIER 1884.

Coram DORION, juge en chef, MONK, TESSIER, CROSS, BABY, juges.

LES DAMES DE LA CHARITÉ DE L'HOPITAL GÉNÉRAL.
Défenderesses en Cour inférieure
APPELANTES ;

&

L'HONORABLE JAMES MACDONALD.
Procureur général du Canada.
APPELANT ;

&

L'HONORABLE SIR ALEXANDER CAMPBELL,
Procureur général du Canada,
APPELANT PAR REPRISE D'INSTANCE.

&

LA CITÉ DE MONTRÉAL,
Demanderesse en Cour inférieure,
INTIMÉE.

JUGÉ :—1o Que les immeubles occupés par la Couronne, en vertu d'un bail ordinaire, sont soumis aux taxes municipales, n'y ayant que les propriétés appartenant à la Couronne ou possédées pour elle en fidéi-commis, qui soient par la loi exemptes de ces taxes ;

2o Que les taxes imposées sur des immeubles loués à la Couronne peuvent être recouvrées en justice des propriétaires de tels immeubles, mais non de la Couronne elle-même, les tribunaux ordinaires n'ayant point juridiction pour prononcer une condamnation, même pour dépens contre le gouvernement de Sa Majesté.

DORION, juge en chef.—Les appelantes ont loué, au gouvernement de la Puissance, un terrain situé dans les limites de la Cité de Montréal, à la charge que le gouvernement paierait, outre le loyer stipulé, toutes les taxes qui pourraient être imposées sur ce terrain. La Cité de Montréal a poursuivi les appelantes pour une somme de $1973,43 pour taxes municipales sur le terrain, pour les années 1874, 1875 et 1876.

L'Honorable James MacDonald, Procureur général de la Puissance, est intervenu dans la cause pour contester la réclamation de la corporation. Par ses défenses, il a prétendu que le terrain, étant occupé par sa Majesté, était exempt de taxes municipales. Les appelantes ont également contesté la réclamation de la demanderesse (Intimée).

L'intervenant, en sa qualité de Procureur général, prétend que le Gouvernement est exempt de payer toutes taxes municipales, en vertu de la section 2 du ch. 4 des statuts refondus

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du Bas-Canada, qui exempte de taxes, non seulement les propriétés qui appartiennent à Sa Majesté, mais encore toutes les propriétés tenues en fidéicommis (held in trust) par aucun officier du gouvernement ou par aucune personne pour l'usage de Sa Majesté. Il prétend aussi que c'est une prérogative de Sa Majesté de ne payer aucune taxe municipale.

La Cour de 1e instance a rejeté ces défenses du Procureur général ainsi que celles des appelantes, et elle a condamné ces dernières à payer à l'Intimée une somme de $1,973.43. et l'intervenant ès-qualité à les garantir et indemniser des conséquences de la condamnation prononcée contre elles, et à leur payer la même somme de $1,973.43, avec intérêt et les dépens.

La Cité de Montréal, par son acte d'incorporation, a le droit d'imposer des taxes sur tous les immeubles appartenant à des particuliers dans la cité de Montréal et d'en recouvrer le montant de chaque propriétaire. Que le gouvernement soit tenu de payer des taxes ou non, la cité n'en est pas moins bien fondée à réclamer des appelantes les taxes imposées sur les propriétés qui leur appartiennent, et qui n'en sont pas spécialement déchargées par la charte de la Cité de Montréal, ou par quelque autre loi.

Elles devaient donc être condamnées, comme elles l'ont été par la Cour de 1e instance, pour les taxes réclamées.

Quant à la contestation du Procureur général, nous sommes d'opinion qu'elle n'est pas fondée. Les propriétés en question sont simplement louées pour l'usage du gouvernement, elles n'appartiennent pas à Sa Majesté et elles ne sont pas tenues en fidéicommis pour l'usage de Sa Majesté, en sorte qu'elles ne rentrent dans aucune des classes de propriétés exemptes de taxes en vertu de la section 2 du chap. 4 des statuts refondus du Bas-Canada, et l'on ne nous a cité aucune autorité pour faire voir que c'était une des prérogatives de la Couronne de ne payer aucune taxe sur les propriétés qu'elle loue de particuliers. L'on pourrait tout aussi bien dire qu'en vertu de cette même section 2, la Couronne est exempte de payer le loyer des propriétés qu'elle occupe comme locataire, que de dire qu'elle est exempte de payer les taxes qui, dans l'espèce, font réellement partie du loyer, puisqu'elles sont une des charges du bail.

La Cour, en renvoyant la requête en intervention et la con-

testation du Procureur général, n'a donc pas mal jugé ; mais ce jugement va plus loin et condamne le Procureur général à rembourser aux appelantes le montant de la condamnation prononcée contre elles, et nous ne connaissons aucune loi qui autorise les cours de justice du Bas-Canada à prononcer une semlable condamnation.

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Nous avons déjà eu à examiner cette question dans la cause de *Monk* et *Ouimet*, 19 L. C. Jurist, p. 71, et nous en sommes venus à la conclusion que les tribunaux ordinaires n'ont pas le droit de prononcer une condamnation, même pour dépens, contre la Couronne ; mais comme dans cette cause, nous déclarons, par le jugement que nous allons rendre, que, si la contestation eût eu lieu entre des particuliers, les Dames appelantes auraient le droit d'être indemnisées pour toutes les condamnations prononcées contre elles en capital, intérêts et dépens, et que la Cité aurait également eu droit à un jugement pour tous les frais en cour sur l'intervention du Procureur général et sur l'appel qu'il a interjeté du jugement rendu en Cour de 1e instance. Cette déclaration permettra aux parties de soumettre leur réclamation au gouvernement de la Puissance : (Statuts Refondus du B.-C. ch. 82. sect. 22.)

Jugement réformé.

Church, *Chapleau*, *Hall & Atwater*, pour les appelants.
Rouër Roy, *C. R.* pour l'Intimée.

MONTREAL, 26TH FEBRUARY 1884.

Coram MONK, RAMSAY, CROSS, BABY, J. J.

DAVID BEATTIE,

Defendant in the Court below,

APPELLANT ;

&

THOMAS WORKMAN,

Plaintiff in the Court below,

RESPONDENT.

QUESTION OF RESPONSIBILITY AND EVIDENCE.

Construction of the terms of a letter of guarantee. In a matter of account where the Evidence is doubtful and imperfect the judgment set aside and an expertise ordered.

CROSS J. — John Hale was a tanner at New Glasgow, Beattie, his son in law, was his agent at Montreal, for the sale of his leather. As early as the 11th July 1871, Beattie

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effected an arrangement with the Molson's Bank, for an advance of $14,000 on Hale's notes, on the conditions that all the hides purchased by Hale should be consigned to the Molson's Bank and at their discretion given to Hale on his furnishing warehouse receipts therefor. A Policy of Insurance over the buildings and stock to be given to the Bank as security for special and general advances, Beattie was to have the sale of the leather for the Bank.

Under this arrangement the Bank made advances to an amount exceeding that so agreed upon, and according to the evidence of Elliott the Bank manager, that institution held warehouse receipts on Hale's leather, comprising nineteen hundred and twenty-two dry hides and thirty bales of Buffalo hides. He says the Bank advances never, at any one time, exceeded $16,150.00, at which they stood on the 23rd December 1872, when the letter of guarantee was given, and which were ultimately paid by Beattie. He, however, on his cross examination, admits that on the 14th October 1872, the amount of notes under discount was $19,029.84, and the entire amount of discounts between the 10th of August 1871 and the 17th May 1873 was $165,201.26. So that by renewal, or otherwise, that amount of paper must have been retired by Beattie for Hale, within the time stated, and the proceeds of the leather was the source from which the actual advances, with interest and charges incident, to the transaction of the business, were to be liquidated. The greatest amount must of course have been renewed, from time to time, until ultimately paid off, but the interest for discounts, commission and other charges would have to be added to the advances and, by so much, augment the sum to be liquidated by the proceeds of the leather.

On the 23rd of December 1872, Hale being in need of a further advance, applied to the Appellant, who it appears had been in the habit of endorsing for him in consideration of a commission. The application was for Workman's endorsement of a note of $2,000, to enable him to get a discount to that amount from the Molson's Bank.

Before consenting to this endorsement he exacted and obtained from Beattie a letter of guarantee which was in the terms following :

Montreal, December 23rd 1872

Thomas Workman, Esqre.

Montreal.

Dear Sir,

In consideration of your endorsing for Mr John Hale, of New Glasgow, a note for two thousand dollars, at three months date, I agree, after having paid the Molson's Bank the amount of their claim and my commission, &c., to hold any surplus there may be to the extent of two thousand dollars for your account against the above note, out of the sale of the sole leather now coming in for sale and in process of manufacture.

Yours truly,

(Signed) DAVID BEATTIE.

On the faith of this guarantee Workman endorsed a promissory note of Hale for $2,200, which he was obliged to take up at maturity, Hale having failed to retire it. He thereupon brought the present suit to force Beattie to render an account of the leather mentioned in the letter of guarantee, in order that the surplus, if any, might be applied to indemnify him for the sum he had been obliged to pay to take up the note, that is to the extent of $2,000 with interest and costs.

The first proceeding of which particular notice need be taken was a judgment rendered by the Superior Court on the 18th April 1876, requiring Beattie to render an account of the proceeds from the sales of the leather mentioned in the letter of guarantee, which he had or ought to have had on hand, after payment of the claim of the Molson's Bank, mentioned in the letter.

Two material questions resulting from the terms, as well of the letter as of the judgment, required to be solved, viz : First, what precise leather was referred to or covered by the terms " the sole leather now coming in for sale and in pro- " cess of manufacture " and 2ndly " what was the claim of " the Molson's Bank and Beattie's commission, &c.," as thus expressed in the letter. These questions require to be borne in

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mind in the further dissussion of the controversy which the case involves.

To comply with this first judgment, Beattie, on the 18th May 1876, produced a general account current between Hale and himself, commencing with a balance of account in February 1879, and including transactions up to the end of June 1873, shewing a balance in his favor of $3,345.51, on the assumption that the whole matter was practically involved in this account, and that the condition of this account was really the criterion determining whether or not there was a surplus after paying Molson's Bank.

This account was contested by Workman, and as a matter of course, was set aside by the Court, because, whether or not it might have shewn a true result, it was obviously not the particular account which he, Beattie, had been ordered to render. It neither separately, nor distinctly shewed, what the particular leather was which was designated in the letter of guarantee, nor, separately and distinctly, the amount of teh claim of the Molson's Bank, commission, &c., which was to be first paid out of the proceeds of the leather.

The judgment setting aside this account was rendered on the 4th of June 1877. It repeated the order for a special account, as required by the previous judgment, which so far as possible should be in conformity with art. 523 of the Code of Civil Procedure.

This judgment was confirmed in appeal.

To comply therewith, Beattie, on the 10th of September 1879, produced a special account in the form directed by the judgment.

This last account was also contested, chiefly on the ground that Beattie had omitted to account for the proceeds of 1,106 sides of sole leather, which ought to have been included, but disputing also the amount returned as the proceeds of the sales of the leather, contending that it should have been $21,060 in place of $16,674.49, as returned in said account, further that the claim of the Molson's Bank should have been only $16,150 in place of $17,372.97, as returned by said account; that Molson's Bank had been long since paid, and there was ample from the proceeds of the leather to pay Workman after paying the Bank.

There were objections of detail but the turning point of

the dispute was whether the 1,106 sides of leather in question should have been credited in this account.

Proof was taken on the contestation and a reference of the account was made to Dinning as an expert. His report includes the proceeds of the 1,106 sides and states the case in various forms but all on the assumption that these 1,106 sides had been improperly omitted by Beattie. Dinning's statement of account, in each of the forms prescribed, made it appear that Beattie should have had enough in hand to pay Workman the $2,000. The report although objected to was homologated and the judgment consequently went in Work man's favor, a conclusion which is now questioned by the present appeal.

Hale's son, who was clerk in the tannery, Taylor who was clerk with Beattie, and Beattie himself concur in stating that all the leather referred to in the letter of guarantee was included in the special account ; that the 1,106 sides were not included, because they were in Beattie's store at the time the letter was written, therefore not within its terms of "leather "coming in and in process of manufacture", and were in fact a separate lot.

To prove the contrary, Workman brought up T. S. Brown, the assignee, to Hale's estate, he having become insolvent in the spring of 1873, and produced copy of an account of sales of leather which had been made out by Beattie, to be used in arriving at an approximate estimate of Hale's estate. In this account the 1,106 sides were included and the proceeds were stated at the figure mentioned in Workman's contestation, but it did not shew the claim of the Molson's Bank, nor whether there were any other charges to go against the proceeds beyond Beattie's commission.

It did not follow from this statement that the 1,106 sides must necessarily be included in the amount to be accounted for to Workman, yet it might be reasonably inferred that altho not literally included in the terms of the letter, if they had come in about the time the letter was written, according to the spirit of the transaction, their inclusion must have been contemplated.

This view would probably have satisfied the Court here, if it were not apparent that other equities might have an opposite influence, as for instance the state of the accounts between

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Beattie and Hale, at the time the letter was written, because if the leather that had already come in was reasonably pledged for and applied to the payment of an existing balance in favor of Beattie, it might not be equitable to have the proceeds withdrawn from that account, which, in effect was probably the account of the advance by the Molson's Bank. Nor is this sufficiently answered by the evidence of Elliott, the manager of the Bank, if even we consider unqualified the statement he makes that the claims of the Bank never, at any one time exceeded $16,150, the amount due at the time the letter was written. It is obvious that in the negociation of the $165,201.26 of discounts, which had been made at Molson's Bank, there would be considerable discounts and interest requiring to be paid, all of which, would, of necessity, be a charge in Beattie's account to augment the claim he would have applicable to the proceeds of the 1,106 sides.

There is little doubt of the general correctness of the account produced by Brown, the same figures of $20,007, as the proceeds of the leather, there accounted for, are reported exactly the same in the first account rendered and produced by Beattie, shewing a balance in his favor, which account was rejected, not because it might not have been correct, but because it was not the account called for by the judgment. These proceeds may, however, be subject to reduction from the fact that some of the leather, estimated as to its probable proceeds, was not at the time, sold, and afterwards when realised, produced less than the estimate.

When Beattie came to produce the special account, he did not include the 1,106 sides, and charged only his commission on the reduced amount. He perfectly agrees in this account with Elliott's evidence as regards the balance then remaining due to the Molson's Bank, viz : $16,150.00, but goes back upon the previous account to add charges as regards interest and otherwise, which Beattie would have had to pay in carrying on the account and discounting notes in Hale's interest. It also included charges of insurance on buildings and otherwise, objected to by Workman, but it is to be observed that these were provided for in the original agreement between Beattie and the Bank.

It seems to me at last doubtful if the 1,106 sides should be included, but obviously if included, they should be with all the

charges incident to the account. It would be unfair to take them into the particular account if they should go there without carrying with them the charges to which they were subject; and if fairly carried to Beattie's credit in his own account, before the letter was written, they should remain there.

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Apprehensive that injustice may be done, we think that the case should be sent back to experts, to ascertain with some kind of precision, what was the amount chargeable as the Molson's Bank claim? Whether the 1,106 sides of leather in question were fairly credited to Beattie on a balance due him before the date of the letter of guarantee involving the state of Beattie's account with Hale on the 23rd December 1872, when the letter was written, but more especially what makes up the amount of the Molson's Bank claim chargeable against the proceeds of the leather? and such other facts as would assist the court in determining whether the 1,106 sides of sole leather should be included in Beattie's particular account and whether Beattie had or should have had in his hands a balance applicable to the note sued upon by Workman.

Kerr, Carter & McGibbon, for Appellant.
Abbott, Tait & Abbotts, for Respondent.

MONTRÉAL, 26 FÉVRIER 1884.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, JJ.

MARGUERITE LAURENT, DITE LORTIE & VIR.

APPELANTS;

&

L'HONORABLE HONORÉ MERCIER & AL.

INTIMÉS.

HELD : That altho the general rule is that the indorsers of a negociable instrument are responsible according to the date of their indorsement, the note in question in this case having been given as a surety for goods, which were sold by the sheriff and bought by one Valade, the Appellant's deceased husband, who made his wife his universal legatee, the Appellant must be held responsible towards the Respondents, altho Valade was not the first indorser of the note.

CROSS J.—In 1875 or 1876, the late Henri Edmond Massé, of the village of Richelieu, in the county of St. Hyacinthe, had become Insolvent, and Mr. M. E. Bernier, notary of St. Hyacinthe, had been duly named assignee to his Insolvent Estate. Bernier caused the effects of Massé to be sold on the 10th of April 1875, and they were adjudged to one Poutré.

Mr. Massé was desirous of acquiring the assets of his Estate and for that purpose solicited and procured the assistance of three friends, viz: Joseph Durocher, farmer of St. Césaire Joseph Valade, merchant of Montreal and the Hon. Mr, Mercier of the same place. He arranged with Valade to substitute his name as adjudicataire in place of Poutré and procured the names of all the three on promissory notes which were given to Bernier, assignee, for the price of the assets purchased. These notes were drawn by Durocher in favor of, and endorsed by Mercier and then by Valade, as second endorser, and by him given to Bernier in settlement of his purchase of the Insolvent's assets. The notes, (there were two) bore date the 28th June 1876, the one in question was made payable five months after date and was for $865 67.

On the 29th November 1881, Bernier instituted a suit against the maker and endorsers of this note, which action was served on the first December 1881, Valade having died in the meantime, the suit as regards him was directed against his surviving wife Marguerite Laurent dite Lortie, who had then married Alexis Dubord, she being universal legatee of her first husband Valade.

Marg. Laurent dite Lortie & vir & L'hon. Honoré Mercier et al.

Mr. Mercier instituted a suit *en garantie* against Marguerite Laurent dite Lortie, Madame Dubord, in which he alleged that he was only accommodation endorser for Valade, who was the actual purchaser of the assets of Massé's Estate, who by power of attorney invested Massé with authority as his agent to realise the Estate and collect the assets, and who, in fact, sold lumber pertaining to it, for some considerable amount, and collected large sums from the outstanding credits, in all more than sufficient to pay the note; he consequently prayed that Madame Dubord should be held bound to indemnify and hold him harmless from the payment.

Madame Dubord pleaded to this action *en garantie*, that Valade was not the personal debtor of the note, that the three parties thereto had signed to enable Massé to retain the effects of his Estate, he promising to keep the proceeds sacred until the note should be paid, which he failed to do, and it was only paid in part; that all three were his sureties, but Valade only after the other two as indicated by their relative positions on the note; that Mercier was the garant of Valade, not Valade of Mercier, also that the note was prescribed for want of being sued for within five years.

After proof made, the Superior Court rejected the plea of prescription, the note having three days of grace to run before its maturity, after the lapse of the time specified when it was to be paid, and the suit having been served the 1st of December, within the five years and three days of the time specified in the Bill for its payment; but condemned the Defendants jointly and severally to pay a balance $568.41, found to be due on the note, and in the action *en garantie*, comdemned Made. Dubord to indemnify and hold harmless Mercier against the judgment in the original action.

She appeals against the latter part of this judgment and submits to this Court the grounds taken hy her in her plea.

The question is reduced to one of proof.

The witnesses were Massé, who was examined while on his death bed, Mercier, Bernier, P. P. Martin, one of the Inspectors of Massé's Estate, J. P. Lortie, Madame Dubord's nephew, who had been clerk with Valade.

The principal explanations are given by Massé. He states that his three friends acted to assist him without any benefit to either of them personally, but apparently without concert

Marg. Laurent dite Lortie & vir & L'hon. Honoré Mercier et al.

as to the respective liabilities assumed by each on his account, save as shewn by the documents signed by each; he however explains that the note sued for was given for the purchase by Valade, of the assets of his Massé's Estate without its appearing that the others were in any manner joint purchasers, the only part taken by them being their signatures on the note. Durocher and Mercier were not to pay unless Valade failed to do so, and Valade therupon afterwards gave him Massé a power of Attorney dated 1st August 1876 to deal with his Estate. Under this power Massé collected as much as he could of the outstanding credits. Suits were instituted for the same purpose, those at St. Hyacinthe being conducted by Mercier as advocate and some at Ste. Marie by M. Poulin, advocate. In his quality of Agent for Valade he realized $140.50 by the sale of sawn lumber, which sum was to go in deduction of the note. He also realized from debtors between $1000 and $1200 and paid to Martin, who at the time held the note, $300, also $60 to Valade, on 24th October 1876, afterwards $275, and later again $200 but he afterwards remembered that this last payment was only $150 and that half of it was to be credited to an account he had with Valade.

Lortie was examined to shew that part of these sums was credited by Valade in account current with Massé, and that he had discovered the other promissory note signed in the same manner as the one in question among Valade's papers.

The fact remained that Massé was Valade's agent and dealt with and collected his estate in Valade's name and for his behoof, and that a great part of these collections had been applied on the note in question, which was to have been all paid by them, and what was collected by Massé would have more than paid it.

The other note was, however, discovered among Valade's papers after his death signed and endorsed for some $432.93 which was no doubt taken up with the proceeds of the estate, and would have diminished the avails in Valade's hands; but this does not alter the nature of the case, nor the principles applicable; Valade was the purchaser of the property which he was bound to pay for. Durocher & Mercier were sureties, but Valade was bound as the primary debtor to indemnify them his sureties, the judgment that went on this

principle against Madame Dubord is therefore correct and should be and is confirmed.

Marg. Laurent dite Lortie & vir & L'hon. Honoré Mercier et al.

Judgment confirmed.

Pagnuelo & Lanctot, for Appelants.
Mercier, *Beausoleil & Martineau*, for Rospondents.

MONTREAL, 23rd FEBRUARY 1884.

Coram DORION, C. J., MONK, TESSIER, CROSS, BABY, JJ.

ELIJAH MORSE.

APPELLANT.

&

CHARLES MARTIN.

RESPONDENT.

The proprietor of a Trade Mark registered in the United States in 1870 caused it to be registered in Canada in 1879, after the passing of the Trade Mark Act of that year, and complained of an infringement prior to the Canadian Registration.

Held, by the Superior Court that for want of a prior registration in Canada, the complainant had no right of action.

Held in the Queen's Bench, that it was unnecessary to determine whether prior registration was required, inasmuch as the complainant had failed to prove that any fraudulent imitation of his Trade Mark had been practised, or that one had been used having a resemblance to it calculated to deceive or mislead ordinary purchasers purchasing with ordinary caution.

CROSS, J :—Elijah Adam Morse sued Charles Martin for $5,000 damages for infringement of a Trade Mark used by Morse on an article of his manufacture styled, "The Rising Sun Stove Polish," by which name, he alleged, it had been registered by him in the United States on the 8th of July 1870, and since that date used by him and known in the United States and Canada, and which he had also caused to be registered in Canada, on the 21st Dec. 1879, after the passing of the Canadian Trade Mark act of that year. The mark in question consisted of a printed vignette or picture of a Rising Sun above a body of water, and across the picture the printed words "The Rising Sun Stove Polish," his goods being put up in small oblong cubical blocks, enclosed in a wrapper of red paper on which was printed the trade mark in question. The infringement complained of as being perpetrated by Martin, consisting of the manufacture and sale by Martin at

Elijah Morse & Charles Martin.

Montreal and elsewhere in Canada, of a Stove Polish put up in packages bearing a vignette or picture of an orb or Sun and across the picture the printed words Sunbeam Stove Polish, which he declared to be an imitation of his Morse's trade mark and manufactured article, calculated to deceive and impose upon the Public and his customers, in fraud of his rights, he therefore claimed the above amount of damages and an injunction to restrain Martin from further acts of infringement. Martin pleaded First, by demurrer which it is unnecessary to further notice, as the whole case came up on his plea to the merits, by which he alleged that for years previously, he had manufactured and sold the article of stove polish bearing his own trade mark, which he had caused to be registered under the Canada trade mark act then in force, and of which the Statute of 1879 was an amendment, and that, as early as the 22nd of October 1876, which was over three years before Morse had registered his mark or sold any stove polish in Canada; and he Martin had since continued to use his own trade mark, which he had a right to do, and which was altogether dissimular to that of Morse, and not liable to deceive or to be taken for that of Morse, who had no right to interfere with his, Martin's business or trade mark, and concluded to be declared the sole owner of his own trade mark, and to have Morse's action dismissed. He also pleaded a *defense en fait*.

On the issues thus raised, and on the proof adduced, the parties were heard in the Superior Court, with the result that Morse's action came to be dismissed by that tribunal, and he now appeals to this Court for a revision of the Judgment.

In the Superior Court the case was made to turn upon a pure question of law, the learned Judge holding that the matters complained of by Morse, as an infringement of his trade mark, having occurred before his registration of it in Canada, 20th December 1879, the law afforded him no remedy, and Martin having registered his trade mark previously, had only exercised his right by using it since that registration, in October 1876. This opinion was based upon the learned Judge's construction of section 4 of the Trade Mark act of 1879, 42 Vic. cap. 22 which reads as follows: "No person shall be en-"titled to institute any proceeding to prevent the infringe-"ment of any trade mark until or unless such trade mark

"is registered pursuant to this act". The learned Judge was of opinion that recourse was entirely dependant upon a previous registration of the trade mark. This construction is disputed by the appellant's counsel, who contends that the provision in question was not meant to entirely deprive a litigant of a vested right which he might have exercised if no such Statute had been passed, but only to postpone the remedy until the trade mark had been registered, thus making it a condition precedent for the exercise of a remedy, as well for a past, as for a subsequent infringement, that the trade mark should be registered, but not intending to exclude the remedy for a previous infringement, which could still be exercised so soon as the trade mark came to be registered. This extremely plausible proposition, I am not prepared either to adopt or reject. There is much reason to presume that the spirit and policy of the law, and the object of its enactment, would go far to support the learned Judge's views, but it has been found unnecessary to deal with this question, we have thought it our duty to investigate the merits of the case on the evidence, and the case in this respect is, on some points, so evenly balanced that it is not without much hesitation that we have been enabled to come to a conclusion.

It appears that for a number of years, extending at least as far back as the date of his registration, Martin did a considerable business in the article of Stove Polish manufactured by him, while Morse's business, probably very extensive, was chiefly confined to the United States. An attempt was made by him to prove that he had advertised at an earlier date in Canada than indicated by his registration, but this proved to be a mistake, and no considerable effort seems to have been made by him to introduce his stove polish into Canada, till at least shortly before the time of his registration, altho Martin's stove polish must have been well known and dealt in extensively for some years, nevertheless more recently the two articles came into competition. Martin had used his trade mark from the time of its registration, but subsequent to that proceeding, probably within a year later, he added a small radiating luminary, more like a star than a sun, yet reasonably enough illustrative of the name he had adopted for his article by the use of the term "Sunbeam" but quite unlike, even in this particular, the rising sun for-

ming part of Morse's trade mark, impressed on his labels. Morse, nevertheless, contends that it is part of his trake mark and that Martin's whole proceeding in the matter is an attempt at a fraudulent imitation of his Morse's adopted trade mark, and that, with the view of procuring his manufacture to be sold and taken, by customers in the trade, as his Morse's well known article of established reputation called the Rising Sun Stove Polish. The two articles, certainly when examined side by side, have the least possible resemblance to each other. True they are both stove polishes, probably made of the same material or ingredients, but one is compact and the other in powder, the packages have not the least similarity in shape or color; one is put up in small oblong cubical blocks, in red wrappers with the device of a well developed rising sun, rising above a body of water, with two mountains in the foreground, whilst the other is put up in cylindrical tin boxes and of two sizes, in yellow wrappers, with the designation or inscription of the Sunbeam stove polish, with a small star or sun about the centre of the label, indicative of the idea of Sunbeam, as connected with the name adopted for the article, so that I think it may be stated as a self evident proposition, that no one, the least acquainted with the two articles, could mistake the one for the other, either by appearance or supposed similarity of the trade mark.

A species of evidence has nevertheless been brought forward to prove the contrary, that is by getting persons to call at the different Grocers' Shops in the City to ask for Rising Sun Stove Polish, which in a number of instances has been answered by the production of Martin's Stove Polish, with the assurance, on the part of the Shop Keeper, that it was really the Rising Sun Stove Polish, and that both were the identical same article. This kind of proof, however plausible, is neither satisfactory nor sufficient. In the first place, Martin is not responsible for the misrepresentations of Shop Keepers induced thereto either by their natural desire to sell their goods, or their ignorance in the matter. It rather goes to show that Martin's goods were well known and Morse's very little known in the trade at Montreal.

Against this there is very satisfactory evidence adduced by the Respondent, that the two articles could not be mistaken

the one for the other, and that Martin's packages were not calculated to deceive or cause his goods to be mistaken, for those of Morse, any further than that both were Stove polishes, and persons who knew nothing of either article, would not be impressed with any distinction between the two.

Much law might be cited on the subject of interfering trade marks. It has been ably ventilated on both sides, but the difficulty does not lie here, it is rather in the appreciation of the facts and the application of the law. A few general remarks from the work of Sebastian on trade marks will sufficiently serve as a guidance in this case. P. 75. "It is not "sufficient for the Plaintiff to produce evidence tending to "shew that, in the opinion of the witnesses, deception may "occur, he has to convince the Court or Jury, that there "is such reasonable probability of deception as to justify "interference with the Defendant". p. 76 "All that Courts of "Justice can do is to say that no trader can adopt a trade "mark so resembling that of a rival as that ordinary pur-"chasers, purchasing with ordinary caution, are likely to be "misled." Much stress has been laid by the Appellant's Counsel on the case of Ewing vs. Johnston, cited from 13 L R. Chancery Division p. 434, and of which a special report has been sent us, but in that case there were manifest indications of the mark complained of being a fraudulent imitation of that belonging to the prosecutor. Both were enclosed in a distinctly outlined triangle, completely corresponding, with a device of two Elephants standing opposite each other, but in the one, the trunks pointed towards each other, while in the other the animals were turned in opposite directions, tail to tail and these were the principal figures. There were minor features of difference, but both were inscribed "Turkey red." It was also argued that Martin had admitted his complicity by answering a demand maie upon him by Morse to desist from the use of the trade mark, offering to relinquish his business for the consideration of $5000. We cannot infer this from his letters, his business may have been but moderately profitable, and he probably considered that it would be a good operation to sell out for a sum so considerable.

It has, however, been matter of grave consideration by the Court whether they should not consider the small astral demonstration on Martin's labels, as an appropriation of part

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of Morse's device, and so far grant the latter's prayer as to order it to be erased, and Martin enjoined against its further use, but on the best consideration we have been enabled to give the subject, we think that there is not sufficient ground for our doing so, more particularly as this seems to have been in use for a long time by Martin before Morse had obtained, much, or any interest in the Canadian trade, and that without any fraudulent purpose, also that this small subs-traction of light, leaves the appellant a sufficiency of the great luminary to exhibit with clearness a well marked distinction between his trade mark and that of Martin, the Court has therefore concluded to confirm, as it now confirms, the Judgment rendered in the Superior Court dismissing appellant's action.

Judgment confirmed.

Kerr, Carter & McGibbon, for appellant.

Robertson & Fleet, for Respondent.

MONTRÉAL, 26 FÉVRIER 1884.

Coram MONK, RAMSAY, TESSIER, CROSS, BABY, J. J.

PIERRE PARÉ,

Défendeur en Cour inférieure

APPELANT ;

&

ROSE PARÉ & VIR.

Demandeurs en Cour inférieure

Intimés.

JUGÉ : *Ramsay, J., différant.*—Que l'acceptation d'une donation sous la charge imposée au donataire de donner quelque chose à un tiers rend parfaite la donation sans l'intervention de ce tiers, qui acquiert ainsi le droit d'exiger, en son temps, l'accomplissement de cette charge stipulée à son profit.

JUGE TESSIER, *Pro curiâ.*—Ceci est un appel d'un jugement rendu par son honneur le juge Chagnon.

Les faits de cette cause sont assez simples. Narcisse Paré avait trois enfants d'un précédent mariage, lorsque, le 23 janvier 1863, il contracta un second mariage. Dans son contrat de mariage de cette date, il donna l'usufruit de ses biens à sa seconde femme, Isabelle Landry, au cas qu'elle lui survivrait mais il y attacha une charge en faveur des trois enfants de son mariage, parmi lesquels se trouve la Demanderesse intimée en cette cause (Rose Paré), comme suit :

" Et de plus il est arrêté entre les parties que sur les biens " mobiliers du futur époux la dite future épouse, si elle sur- " vit au dit futur époux, paiera la somme de cent piastres à " chacune de Marie Paré et Rose Paré, filles nées du mariage " du dit futur époux avac la dite défunte Anastasie Gauthier " Ces sommes de deniers seront payables à l'âge de majorité " des dits enfants du futur époux et cette somme de quatre " cents piastres sera prise sur les biens mobiliers du futur " époux et comme dettes par lui dues."

La présomption est que ces arrangements étaient faits en vue de régler, entre Narcisse Paré et ses enfants et sa future épouse, les droits que chacun pouvait avoir, tant sur les biens de la première communauté que sur ceux de la seconde.

Le 14 décembre 1877, Narcisse Paré, père, fit donation à

Pierre Paré & Rose Paré et vir.

Pierre Paré, son frère, de tous les biens qu'il possédait alors aux conditions de payer toutes les dettes actuelles du donateur sans exception, y compris celles à échoir à l'avenir, et de garder avec lui le donateur et son épouse et de les nourrir· Cette épouse, Isabelle Landry, intervint à l'acte et renonça à son usufruit des biens en faveur du donataire, Pierre Paré, l'Appelant.

Narcisse Paré, père, décéda le 5 juin 1879. A son âge de majorité, mais après le décès de son père, l'Intimée Rose Paré, fit un acte formel d'acceptation de cette somme de $100 que son père avait stipulée dans son contrat de mariage comme devant lui *être payée* comme une *dette due* à elle.

C'est pour le recouvrement de cette somme de $100 et de $50 comme héritière d'un quart de la part de son frère décédé, que la présente action a été portée par Rose Paré contre son oncle Pierre Paré.

Le défendeur Intimé a nié devoir et a excipé du droit de la Demanderesse, parce qu'elle n'avait fait acte formel d'acceptation qu'après la mort de son père, et que c'était une obligation de la seconde femme Isabelle Landry.

La Cour inférieure a rejeté ces prétentions du Défendeur et l'a condamné à payer le montant de la demande.

C'est de ce jugement qu'il y a appel.

Il faut observer d'abord que le contrat de mariage contenant l'obligation en question, a été dûment enregistré en temps utile. Cette obligation *de payer* ce qui est qualifié une dette, n'est pas une donation proprement dite, mais c'est une charge de la donation de l'usufruit faite à la femme, laquelle a accepté cette donation comme partie au dit contrat de mariage.

Cette obligation de payer cette somme n'avait pas besoin d'être acceptée du vivant du père par l'enfant; la mère avait accepté elle-même et était devenue débitrice de cette somme comme l'une des charges de son usufruit. Elle a cédé son usufruit à son beau-frère, Pierre Paré, qui s'est chargé de payer les dettes présentes et à venir du donateur et, par conséquent, il est devenu débiteur de cette somme envers l'Intimée.

Par l'article 821 du Code civil, il est dit que l'acceptation se présume dans les cas mentionnés en la seconde section qui précède; or dans l'article 777 de cette 2me section il est dit :

" La donation d'une rente créée par l'acte de donation, ou

d'une somme d'argent que le donateur promet payer, dessaisit le donateur en ce sens qu'il devient débiteur du donataire." Pierre Paré & Rose Paré et vir.

L'article 1029 du Code civil s'y ajoute en ne fixant aucun délai pour la " signification de sa volonté d'en profiter," ce qui ne veut pas dire qu'il faut une acceptation formelle du vivant du donateur, comme dans la donation proprement dite, mais qu'il suffit au tiers de signifier sa volonté d'en profiter. C'est ce qu'a fait l'Intimée.

La jurisprudence est dans le sens du jugement rendu en cette cause comme on peut le voir, entr'autres causes, celle de *Dupuis* & *Cédillot*, 10 L. C. Jurist, p. 338. *Charlebois* & *Torrance* 20 L. C. Jurist, p. 27.

Held : " That the parties to a marriage contract and the " registration of said contract, whereby a sum is payable by " the wife to a third party cannot annull the clause, by " which said sum is payable to the third party without the " consent of the last."

Pothier, Obligations, No 72 & 73.

Au No 73, l'auteur discute si la stipulation de donner quelque chose à un tiers est irrévocable ; et il dit que ce droit ne devient irrévocable qu'après la mort du donateur ; mais il ajoute que plusieurs sont d'avis qu'elle ne peut pas même être révoquée du vivant du donateur.

" La charge imposée au donataire de donner quelque chose " à un tiers renferme une seconde donation ou une donation " fidéicommissaire, que le donateur fait à ce tiers. Cette " seconde donation, sans l'intervention de ce tiers à qui elle " est faite, reçoit son entière perfection par l'acceptation que " le premier donataire fait de la donation sous cette charge, " puisque par cette acceptation il contracte envers ce tiers, " sans qu'il intervienne à l'acte, un engagement d'accomplir " cette charge dans son temps. De cet engagement naît un " droit qu'acquiert ce tiers d'exiger en son temps l'accomplissement de cette charge. Ce droit est un droit irrévocable."

Jugement confirmé.

E. Z. Paradis, pour l'Appelant.

Pagnuelo & *St. Jean*, pour l'Intimée.

MONTREAL, 21st. FEBRUARY 1884.

Coram DORION, C. J., MONK, RAMSAY, CROSS & BABY, JJ.

DAME EVANGELINE McDONELL & AL.

APPELLANTS.

&

ALEXANDER BUNTIN,

RESPONDENT.

In a suit of Dickson vs. Dier, the property of the latter was sold under a judgment held against him by Dickson. The appellants complain of the Judgment of distribution and claim by the present action, as being theirs, certain sums which were awarded to Respondent.

HELD : 1ST — That the appellants have suffered in the distribution of monies by their own negligence, by not attending to it :

2LY — That if they were aggrieved by said judgment of distribution, they should have sought redress by means of an appeal, or of an opposition to the judgment within fifteen days, and not by an independent action.—

CROSS, J : —The appeal in this case is from a judgment sustaining a demurrer, and dismissing a suit brought by the appellants against the respondent.

The declaration complains that Buntin received under a judgment of distribution a sum of $330, which of right belonged to the appellants, under circumstances which may be briefly stated as follows :—

Joseph Dier was owner of a property in St. Antoine suburb consisting of lot cadastral No. 642, which was again subdivided into a number of small lots.

One Joseph Dickson held a judgment against Dier, under which be brought the property to sale. The sheriff made a return of the proceeds accompanied by the registrars certificate which the law required him to procure.

This certificate shewed Buntin to be a hypothecary creditor on the property to a large amount.

It also showed that the auteurs predecessors of the appellants had a prior claim for their $330, as original vendors of two of the sub-division lots, a fact which was overlooked, Buntin having been collocated for the entire balance of proceeds after the expenses and privileged claims, and the appellants omitted from the collocation, although their registration was duly made showing their priority.

The judgment of distribution was homologated and Buntin awarded the proceeds. Dame Evangel. McDonell et al. & Alex. Buntin.

The appellants claimed from Buntin and Dier, that $330 of the money received by Buntin should be declared the property of the appellants, and Buntin be condemned to restore it to them, as having been received by him without cause and as money not due him, but due to the appellants.

This suit was met by a demurrer, based chiefly upon Art. 761 of the code of Civil Procedure, which reads that "any "party aggrieved by a judgment of distribution may seek re-"dress by means of an appeal, or a petition in revocation, if "there are grounds for it, whether he has appeared in the "suit or his claim being mentioned in the certificate of hy-"pothecs he has not appeared."

"Any creditor mentioned in the Registrar's certificate who "has not appeared in the cause may, moreover, within 15 "days, seek redress by means of an opposition to the judg-"ment."

The demurrer takes the further ground generally that the appellant has no legal recourse against the respondent for the causes alleged.

It is contended that the appellants having failed either to appeal in time, or seek redress within 15 days by petition in revocation of judgment, are not nevertheless limited or precluded by the provisions of this article from seeking recourse by an independent action; that the remedy under this article is a faculty given to the party injured which he may exercise or not, as he sees fit, but may nevertheless sue for what belongs to him; that the amount received by Buntin and which ought to have been awarded to appellants was their property, did not belong to Buntin and ought to be restored to the appellants, the real owners.

It is not strictly true that the money belonged to the appellants; they were creditors, and pretended to have a preference over Buntin, but he also was a creditor, and the question of property is one to be determined by the Court. The appellants should have attended to their interest in the distribution of the monies, and raised any question they had to raise before the monies were disposed of by the judgment of distribution. It is of importance that it should be so, to avoid the great amount of litigation that would ensue if

Dame Evangel. McDonell et al. & Alex. Buntin.

every person who found himself disappointed in the result of a distribution intended to be final, should be allowed to raise the question anew by an independent suit.

Before the law was enacted which requires the Sheriff to procure and return with the proceeds of sale a Registrar's certificate shewing the hypothecs on the property sold, every person who had a claim was obliged at the peril of losing his recourse to bring forward and file his claim within a very limited delay, and watch the distribution of the monies to see that he had justice done him according to his rank. Now that the registrars certificate is made a basis for collocating the rights of the parties, it does not follow that complete justice will necessarily be done a creditor or that he is guaranteed against mistakes, without the exercise of any diligence on his part; it is only a further protection and security to him, but goes no further than the law itself warrants. Beyond this the law remains the same, favoring the diligent and still requiring him to watch his interest against mistakes in the distribution of the monies. In this case the appellants have to suffer the consequences of their neglect, and the judgment must be confirmed. The award of the monies to Buntin must be considered a finality.

Judgment confirmed.

Mr. Calder, for appellants.

Messrs Bethune & Co. for respondent.

MONTREAL, FEBRUARY 26th. 1884.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, J. J.

Ex parte WALSH,

Petitioner on a writ of *habeas corpus*.

HELD : That the curator of a person interdicted as being an habitual drunkard, under the 33 Vict. ch. 26, Lower Canada Statutes, has the power to place such a person, in any duly licensed institution for the cure of drunkards, whenever he may deem it desirable. (The Hon. Mr. Justice RAMSAY dissenting.)

DORION, C. J.—This is a writ of *habeas corpus* obtained upon the affidavit of a third party alleging that the petitioner is detained without authority in the lunatic asylum of Long Pointe, and that the Deponent had been informed by the Superioress of the establishment, that the Petitioner was kept there upon the order of his wife. By the return to the writ which is not in a very technical form and consists in the production of several documents attached to the writ, it appears that the Petitioner was on the — of May 1883 regularly interdicted as being an habitual drunkard, and that E. Black, his wife, was duly appointed his curatrix; that the establishment in which the Petitioner has been placed, is one licensed under the Act 33 Vict. ch. 26, being an Act to provide for the interdiction and care of habitual drunkards, and that on the 12th. of January last, he was brought to the Institution where he has since been detained under a verbal order from his curatrix. Attached to the return is also a letter from the curatrix addressed to the Superioress of the establishment, dated this 26th. of February, requesting that the Petitioner be kept in the Institution as being an habitual drunkard.

That the Petitioner was interdicted and his wife appointed curatrix is established by the production of a copy of the Act of interdiction. A copy of the order in Council granting a license to the establishment under the Statute is also produced, together with two letters from the Assistant Provincial Secretary.

The facts established by these documents have not been controverted and the Petitioner merely relies upon the illegality of his detention under the provision of the Act, and he contends that the Statute gives no authority to imprison

Ex parte Walsh. or detain a person in the position of the Petitioner without an authority from a court or judge.

The Act in question which is, no doubt, a pretty crude piece of legislation, lacking in several particulars of the means of protection which ought to be available to those who might be harshly or improperly dealt with, provides: 1st. "That on a petition under oath, to any judge of the Superior Court by any relatives, or friends, in default of relatives, of an habitual drunkard, setting forth that by reason of drunkenness, such habitual drunkard either squanders or mismanages his property, or places his family in trouble or distress, or transacts his business prejudicially to the interest of his family, his friends, or his creditors, or that he uses intoxicating liquors to such an extent that he incurs the danger of ruining his health and shortening his life, such judge may, for any of these reasons established to his satisfaction, pronounce the interdiction of such an habitual drunkard and appoint a curator to manage his affairs and *control his person, as in the case of one interdicted for insanity.*

Section 3rd provides that the interdiction shall have the same effects as those conferred by the law in force in this province in the case of the interdiction of any person *for insanity.* Any person so interdicted may be relieved from such interdiction after one year of sober habits.

The wife may be appointed curatrix and shall have all the powers of curators to persons *interdicted for prodigality.* (Sect. 10.)

The Lieutenant Governor is authorized to grant a license to keep an asylum for the cure of drunkards." (Sect. 15.)

And then Section 17 is in these words:—"The curator of any person interdicted under this Act may place the person interdicted in any duly licensed institution for the cure of drunkards and may remove him from the same whenever he shall deem it desirable."

Since the passing of this Act the words "for prodigality," have been substituted to those "for insanity," in the 3rd Section of the Act. See Act of 1879, 43 Vict. C. 28.

The same words "for insanity," which are to be found at the end of Section 1, have not been altered, so that by the 1st. Section the curators are appointed to manage the affairs and control the person of an habitual drunkard who is inter-

dicted as in the case of one who is interdicted for insanity, Ex parte West
while by the 3rd Section the interdiction of an habitual drunkard has only the same effects as those conferred by law in the case of one interdicted for prodigality. It will be noticed also that by Sect. 10 the wife, when appointed curatrix, has all the powers of curators to persons interdicted for prodigality and is subject to the provisions of Art. 180 of the Civil Code.

The Petitioner strongly relied upon the powers conferred upon the wife, as differing from those of other curators; but from the change made in Section 3, there would seem to be now no difference as to the effects of the interdiction, whether the wife be the curatrix or whether another person has been appointed curator to her husband. Moreover the provisions contained in Sect. 10 authorizing the wife to be appointed curatrix to her husband and the reference to the provisions of Art. 180 C. C., show that this provision was made in view of civil proceedings and in order to prevent the wife from instituting proceedings without being thereto authorized as required by Art. 180 C. C. Notwithstanding the provisions contained in Section 3, as amended and in Section 10, Section 17 which gives to the curator of a person interdicted under the Act the power to place such a person in any duly licensed institution for the cure of drunkards and to remove him from the same, whenever he shall deem it desirable, had not been altered.

There is no distinction made by this last Section as between the wife who is curatrix or any other curator. The terms are general and apply to all cases of interdiction under the Act. This authority is not limited by any other provision of the Statute and, although it may seem to be a very extensive power conferred upon a curator and may be liable to abuse, we can only inforce the law as we find it in the Statute. We may regret that no control seems to have been provided for cases of abuse of such an authority, yet we think that in the present case we have no other duty to perform than to quash the writ of *habeas corpus* and to order that the Petitioner be taken back to the institution where he has been placed by his curatrix.

We do not mean to say that if it had been alleged that the Institution was not duly licensed to receive persons inter-

Ex parte Walsh dicted as habitual drunkards, or that gross fraud in obtaining the interdiction had been committed, or that it had been obtained without cause, that we might not have had the power to inquire into the truth of the allegations and ascertain if the return made to the writ of *habeas corpus* disclosed the real facts of the case, but as it is, we have nothing but the naked facts that the petitioner has been duly interdicted as being an habitual drunkard, that he has been placed by his wife and curatrix in a duly licensed institution for the cure of drunkards and that he is detained there by her direction. The interdiction has been obtained at the request of the petitioner's wife; two of his sons, one a merchant and the other a clerk, are among the friends and relations who advised his interdiction for habitual drunkenness, all the others seem to be men of education and of position, and this advice on which the judge has acted was given on oath as required by law when it is necessary to pronounce an interdiction and to appoint a curator to an interdicted person.

There is, therefore, a strong case made out that the petitioner is in such an institution as the law intended he should be placed in, and nothing has been shown to indicate that he has been dealt with harshly or unjustly.

It has been contended that the Provincial Legislature had no right to pass an Act, as the one under consideration, which is in restraint of the liberty of the subject. If it were so we would have to decide that the Provincial Legislatures have no right to pass laws for the interdiction and control of minors, lunatics and others unable to control their person or property, for all provisions in respect to such persons are in restraint of the liberty of the subject. The majority of the Court is of opinion that there is nothing in this objection and the writ of *habeas corpus* is therefore quashed.

Writ quashed.

Greenshields, McCorkill & *Guerin, for* Petitioner.
Kerr, Carter & *McGibbon, for* Curatrix.
S. Pagnuelo, Q.C., for the Sisters of the Asylum.

MONTREAL, MARCH 27th, 1884.

Coram DORION, C. J., MONK, RAMSAY, CROSS & BABY, JJ.

LES ECCLÉSIASTIQUES DU SÉMINAIRE DE SAINT SULPICE DE MONTRÉAL.

(*Creditors collocated in the Court below*)

& APPELLANTS.

LA SOCIÉTÉ DE CONSTRUCTION CANADIENNE DE MONTRÉAL.

(*Contesting below.*)

RESPONDENT.

HELD:—That the registration of a deed of sale in which the immoveable sold is described by its cadastral number, and in which the purchaser undertakes to pay the amount of a hypothec duly registered before the proclamation of the cadastre, will not supply the place of the renewal of the registration of such hypothec required by C. C. 2172.

The appeal was from a judgment setting aside the thirteenth item of a report of distribution, and declaring that the building society, respondent, was entitled to rank before the seminary for the sum due to it.

RAMSAY, J.—This appeal comes upon a question purely of law. It is whether the Appellants have lost the priority of their hypothec by their failure to renew, according to the precise formalities of law, the registration of their claim; that is to say, whether what is equivalent will suffice.

The Appellants' claim for $400 was due on a deed of sale from them to one St. Jean, dated the 13th February, 1873, registered on the following day. On the 15th July, 1873, the *cadastre* for the parish of Montreal was put in force, and consequently the time for re-registration expired on the 15th July, 1875. The Appellants did not re-register. On the 16th August, 1873, St. Jean hypothecated the property in question for $1,900, which was duly registered under the new system. It is admitted that if there was nothing but this the Appellants have lost the priority of their hypothec. But it is established that on the 21st February, 1874, a deed of sale of the above property was made to one Faille, in which the debt to the Appellants was reserved, the purchaser promised to pay it, and this deed referred fully to the previous deed and to its

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registration by date and number, and Faille's deed was duly registered on the 8th April, 1874.

The argument is this: Registration is for the purpose of publicity, it is not necessary that all the formalities of the law should be observed; it is not necessary that the registration should be done by the party interested—the registration of a deed by a stranger is as effective as the registration by the creditor or his agent, therefore the registration of the deed to Faille was a good registration of Appellant's hypothec, at all events from the 8th April, 1874. Further it is argued the requirements of re-registration cannot be greater than those of the original registration; it is specially provided by an Act (38 Vict., ch. 14) sanctioned 23rd February, 1874, and consequently before the expiration of the delay to re-register, that the notices mentioned in 2172 may be given by any person for the party interested, and that, as the registration of the deed to Faille would be sufficient as a registration to protect Appellants' claim, it is equivalent to a re-registration of the original deed from Appellants being made *en temps utile*, that is before the delay to renew had expired, and that the failure to re-register does not put the Respondents in a worse position than they were in before. They took their security subsequently to the registration of the Appellants' claim, and when that claim was validly registered, and if the Respondents succeed they do so simply by the omission of the Appellants to do something that the Respondents had no interest in having done.

On the other hand it may be said that the system of registration, like every kind of publication, is the creation of positive law. It is created not for the purpose of giving notice to a particular person who does not know, but in order that no one can plead ignorance, and so the knowledge of the existence of a prior debt does not cover the want of registration. For the same reason it is absolutely necessary to comply with the forms prescribed, and it is not sufficient to do something else that might, if the law had so willed it, have been a sufficient warning. Article 2172 prescribes the requirements for the *renewal* of registration. There must be a renewal containing a notice describing the immoveable affected, in the manner prescribed in Article 2168, *and conforming to the other formalities prescribed in Article 2131 for the ordinary*

renewal of the registration of hypothecs. In turning to 2131 we find there must be "a notice to the registrar, designating the document, the date of its original registration, the immoveable affected, and the person who is then in possession of it, and the volume and page in which the notice of renewal is registered must be referred to in the margin of the original registration." There was no such notice, and consequently there has not even been an attempt at a renewal.

Appellants' argument is supported in this way: He says that the Cour de Cassation in dealing with this very subject has invariably laid down the broad rule that the formalities of inscription need not be followed in the renewal. Sir. Cass. 3 Feb. 1819: Dalloz, 25 Feb. 1825. Troplong says there is a decision of the Cour de Cassation, 14 Jan. 1818, contra. Dalloz, Hyp. 307. I think this must be a mistake and that properly considered the *arrêt* of 1818 does not turn really on this point. It is not likely the Cour de Cassation would on the 25 Feb. 1819, overrule so recent a decision. It seems to me that this is unquestionably the jurisprudence in France. The doctrine assumed by Aubry & Rau appears to be that, 1st. that it is not absolutely indispensable that the renewal should follow all the formalities of the Article 2148 C. N.; 2nd. that in default of any enunciation or indication of the previous inscription "la nouvelle inscription ne vaudrait que comme inscription première." Upon the first point there is tolerable unanimity of opinion, but Troplong evidently considers the requirements of the date as partaking of the character of judge-made law. (3 Pr. & hyp. 75.) However this may be it has been steadily adhered to. Sir. Cass. 14 June 1831; 29 August 1838; 16 Feb. 1864. But the question for us is whether these decisions apply to our law and how far they apply. I am disposed to think that their abstract principle applies. That is to say, I think that here as in France a renewal may be sufficient, if the requirements of the law be substantially, though not literally, complied with. But the law, as laid down in France, cannot furnish a guide to us as to what is a substantial compliance with the code, for their system differs essentially from ours. Their renewal is prescribed by a very short article 2154: "Les inscriptions conservent l'hypothèque et le privilége pendant dix années, à compter du jour de leur date; leur effet cesse si ces inscrip-

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tions n'ont été renouvelées avant l'expiration de ce délai." Now, the discussion there arose as to whether this meant that a new inscription should be made as directed by Article 2148. And the arrêts I have referred to are the judicial answer to the question of what it was necessary to do. Here, however, our legislative attention being specially directed to the Code Napoléon, we deliberately devised a system totally different, and which lays down an explicit procedure which must be followed. The party desiring to renew gives the registrar a notice specifying the particulars of the deed to be renewed. This notice is inscribed at full length in a new book, and its inscription is indicated in an index. In addition to this the registrar is obliged to enter on the margin of the original inscription a mention of the renewal. It is quite obvious that a man perfectly conversant with the requirements of the law might follow its behests to the letter for all that he desired to know and never discover that there was a re-registration. That is, he might look at the old inscription which he knew of, and no note in the margin would tell him that that hypothec had any effect (2082). He might turn to the index of remarks and find it totally blank. He might go to the registrar and demand a copy of the deed registered, but no marginal entry would testify to the renewal (2178), or that the deed was other than it seemed, an hypothec which had no effect. Nothing but a full search, which no one is bound to require if he only desires to know a particular fact, would have disclosed the new inscription by Faille's Deed. In France it appears that the party is obliged to make a general search, and, therefore, he cannot fail to find the warning. But we are told a party to the deed, like respondent, knew, and so forth. But under our law it is not a question of bad and good faith with us. Knowledge is nothing, and, therefore, we are not perplexed like the Cour de Limoges when it ruled: "Le renouvellant d'une inscription hypothécaire est valable bien qu'il ne mentionne pas l'inscription renouvelée. Il en est surtout ainsi vis-à-vis des créanciers qui ont connu l'inscription primitive, et qui n'ont pu, dès lors, éprouver aucun préjudice de son défaut de mention dans le renouvellement." (Sir. 14 Av. 1848.) It would be impossible to distribute the money arising from a sale if we were to admit this mistaken doctrine of equity. Registration is not

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the only institution of the law where real rights are lost by *laches*; for instance, the omission to give notice of protest to an endorser relieves, not because he suffers by not being notified, but because he may suffer. I am, therefore, to confirm.

I may remark, there is a little difficulty which might perhaps be serious under certain circumstances, but which was not raised in this case, and which has no effect on the judgment rendered. Faille's deed gives an incorrect date as being that of the one it evidently intends to refer to.

DORION, C.J., said the question might be a technical one but it was one of great importance. Article 2172 of the code says how renewal of registration may take place; that renewal is by a notice given to the registrar that the party intends to renew such a mortgage which he has on the property. This renewal is not entered in the ordinary registration book, but in a separate book. So that a party going into the registration office and asking whether a certain mortgage had been renewed, the registrar might give him a certificate that there had been no renewal (though it might appear on the other book). This is what would happen if the registration by a purchaser of his deed of purchase was considered equivalent to a renewal of the mortgage mentioned in the deed: for the registration of the deed would not appear in the book of renewals, but in the book of registration.

Some authorities have been cited by the Appellants to show that a creditor does not lose the benefit of the registration of his claim by reason of irregularities which could neither mislead nor prejudice third parties.

These authorities do not apply to the present case. There was here no renewal of the registration of the Appellants' hypothecary claim. This is not a simple irregularity, but a total absence of a formality required by law, and it is proposed to supply the defect by the registration by a subsequent purchaser of his deed of purchase which contains a mention of the Appellants' hypothec and prior registration. This is a totally different proceeding from that which the law requires and to sustain the Appellants' pretentions would be equivalent to say that the knowledge which third parties may have of a prior registered claim, would dispense with the necessity of

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renewing the registration of the claim which is required by Art. 2172 C. C. This would be contrary to the whole purport of our registry laws based upon that publicity given by the mode of registration indicated, and which no notice or prior knowledge can supply. (Art. 2085 C.C.)

In matters of registration a strict compliance with the requirements of the law is essential, and the omission of one formality is not supplied by the accomplishment of another, as shown by Troplong, Priv. et hyp., 727, in a somewhat analogous case; 3 Aubry et Rau, pp. 374, 378, 382 and 383, note 36.

The case was, no doubt, one of special hardship, but the Court had no alternative but to come to the conclusion that the judgment must be confirmed.

MONK, J., said he confessed that the case had perplexed him very much on the *délibéré*, but he had the advantage of knowing that four judges of this Court agreed in maintaining the judgment of the Court below, and the case was one of so much doubt that he did not feel justified in entering a dissent. The property in question was sold by the Seminary to St. Jean. The deed was registered on the same or the following day. There remained due upon the sale the sum of $400, which was payable at six per cent. Subsequently to that, some time in February or May, St. Jean, who had purchased from the Seminary, mortgaged the property for $1,900. There did not seem to have been any notice of the money due except this, that the Respondent took communication of the deed from the Seminary to St. Jean. Notwithstanding the existence of the mortgage for the $400, the Respondent thought proper to advance the sum of $1,900 to St. Jean. We had, therefore, the deed sale from the Seminary, we had the deed mortgage from St. Jean to the present Respondent for $1,900, both deeds registered. At this time the proclamation of the *cadastre* had not been issued. After the proclamation was issued St. Jean sold the property. In the deed from St. Jean there was a full enunciation, and a reference to the $400 due the Seminary. And not only that, but there was reference to the $1,900 due to the present Respondent. Not only was there a reference and an indication of these liabilities, but there was an undertaking on the part of the purchaser, Faille, to pay the

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Seminary and also to pay the present Respondents. There was an indication and acknowledgment of the existence of these liabilities on the part of Faille. This deed of sale was immediately registered.

His Honor's first impression was that this was perhaps sufficient publicity of the mortgage: that no one could be led astray; and he was inclined to hold that it was equivalent to a renewal of the hypothec. But he law requiring the renewal was very strict. The previous creditor, unless he adopts the formalities pointed out by the code, will lose his claims or be postponed to the subsequent creditor, who has taken the precaution to re-register. This was very strict, it was very troublesome; it had been found so in France, and probably in every civilized country in the world. But however strict, however precise and obligatory this might be, looking at it as a general rule, His Honor was disposed to say at first that this Court, if the justice of the case required it, could relax the stringency of the rule, and could mitigate the severity of the law. The question was this: Was this registration of St. Jean's deed publicity as to the hypothec? His Honor was disposed at first to think that it was sufficient, but on further consideration he had reluctantly come to the conclusion that the law as laid down in our code must be strictly followed. This publicity did not dispense the Appellants from the necessity of re-registration. It seemed hard; they would probably lose their money; but in the end, after much consideration it appeared to His Honor that the Respondents were entitled to be collocated in full for their claim for the simple reason that the Seminary had not thought proper to re-register according to the exigencies of the code. The penalty was that in the absence of this re-registration the claim must be postponed to that of the Respondents. Therefore, with great reluctance, and after much hesitation, His Honor came to the conclusion that the judgment of the Court below was correct and must be confirmed; and naturally, he had not less confidence that this conclusion was correct seeing the five judges here and in the Court below concurred in the same opinion.

Judgment confirmed.

Geoffrion, Rinfret & Dorion, for Appellants.

Béique & McGoun, for Respondents.

MONTRÉAL, 31 OCT., 1883.

Coram DORION, JUGE EN CHEF, MONK, RAMSAY, TESSIER, & CROSS, J. J.

Nos. 556 & 557.

P. A. A. DORION,

Défendeur en Cour de 1re Instance,

APPELANT;

&

J. B. T. DORION,

Demandeur en Cour de 1re Instance,

INTIMÉ.

&

E CONTRA.

JUGÉ: 1o. Que la prescription de dix ans ne s'applique pas à une demande en résiliation ou résolution d'un acte simulé.

2o. Que celui qui a été partie à un acte simulé, peut en demander la résiliation, lors même qu'il l'aurait consenti avec l'intention de frauder ses créanciers, si cette fraude n'est pas en tout ou en partie la cause ou considération de la convention entre les parties.

Cette action a été intentée par l'Intimé pour faire résilier un acte de cession qu'il a faite à l'Appelant, le 22 Décembre 1862, d'un sixième qui lui appartenait dans les capitaux, intérêts, loyers et revenus dans la succession de feu Jacques Dorion, à compter de la nomination de feu Pierre Moreau comme curateur à cette succession; l'Intimé alléguant que cette cession a été faite sans cause et seulement pour confier l'administration de ses biens à l'Appelant pendant la durée de plusieurs procès dont il craignait l'issue, et avec l'entente et la promesse de la part de l'appelant qu'il lui ferait une rétrocession des biens cédés quand il en serait requis et qu'il lui rendrait compte de ce qu'il aurait reçu pour lui en vertu de cette cession.

Par une première exception l'Appelant a plaidé la prescription de dix ans, Secondement: qu'en supposant que la cession aurait été faite sans cause et seulement pour mettre les biens de l'Intimé à l'abri des poursuites de ses créanciers, l'Intimé ne pourrait demander la nullité de son acte parce que ce serait invoquer sa propre turpitude.

Suit une troisième exception par laquelle l'Appelant allègue que l'intimé n'a, en vertu du testament de feu Jacques Dorion, aucune part en propriété dans les biens de sa succession, et qu'il ne peut les réclamer par son action; qu'il, l'Appelant, n'a jamais été chargé par l'Intimé de gérer ses biens, que lorsqu'il a agi pour lui c'était en vertu d'autorisations spéciales; qu'il n'a jamais refusé de lui rendre compte et que l'Intimé lui doit des sommes considérables—pour quoi il conclut au renvoi de l'action.

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L'Intimé a répondu en droit aux deux premières exceptions de l'Appelant et à la dernière partie de sa troisième exception.

La Cour de première instance a maintenu ces défenses en droit. L'Appelant a obtenu la permission d'appeler de ce jugement qui a renvoyé ses deux premières exceptions et partie de la troisième.

DORION, Juge en Chef—Lorsque la demande pour permission d'appeler du jugement interlocutoire qui a renvoyé les exceptions de l'Appelant comme mal fondées en droit a été faite, les questions soulevées avaient paru compliquées et cette Cour a cru devoir permettre l'appel. Mais après examen des plaidoiries la cause ne présente aucune difficulté.

La prescription de dix ans, établie par l'article 2258 s'applique aux actions en rescision d'actes pour cause d'erreur, fraude, violence ou crainte, mais non pas à une action en résolution ou révocation d'un acte simulé et qui n'a rien de réel.

L'Intimé n'allègue pas que c'est par erreur, par fraude, violence ou crainte qu'il a été induit à consentir l'acte du 22 Décembre 1862. L'action, au contraire, est basée sur une promesse formelle de la part de l'Appelant de rétrocéder à l'Intimé les biens cédés lorsque celui-ci l'en requerrait. Une telle action fondée sur une convention établissant une obligation personnelle ne se prescrit que par trente ans. (Larombière sur l'Art. 1304, C. N., No. 18.—Aubry & Rau, t. 4, p. 277 et 278, note 28.—Laurent, t. 19, Nos. 29, 30 et 33.

La Cour de première instance a bien jugé en renvoyant la première exception de l'Appelant.

Sur la seconde exception il y a plus de difficulté. L'Appelant s'appuie sur la règle que personne ne peut invoquer sa propre turpitude pour établir sa demande. Cette règle tirée du droit

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romain, existe encore parmi nous,—mais s'applique-t-elle à l'espèce? Les auteurs sont divisés et les arrêts diffèrent, en sorte que la jurisprudence n'a pas encore tranché la question. Ainsi, il a été jugé par la Cour royale de Limoges, le 28 Nov. 1848, "Que la partie qui a emprunté la forme d'un contrat dans une intention frauduleuse, notamment pour soustraire ses biens aux poursuites de ses créanciers, est recevable à en opposer la simulation à l'autre partie qui prétend se prévaloir du contrat."—(J. du P. 1851, 2, 541.)

La même chose a été jugée à Bordeaux le 29 Nov. 1828.—(Sirey, 1828, 1830, 2, 162.)

Mais la Cour d'appel de Chamberry a jugé le contraire le 6 Mai 1861, dans une cause de Bron et Her. Bron. (J. du P. 1862, 105.)

L'opinion de ceux qui refusent l'action pour faire annuler un acte simulé parce que celui qui l'intente aurait eu l'intention de frauder ses créanciers ne repose que sur une confusion entre la cause qui détermine les parties à contracter et le motif qui les porte à le faire; la première est la cause finale, celle d'où dépend la validité du contrat; la seconde est la cause impulsive, elle n'est qu'accidentelle et sans influence sur la convention des parties. (Demolombe, t. 24, nos. 345, 346 et 355.

Cet auteur, au dernier numéro cité, s'exprime comme suit:

"Maintenant est-il besoin d'ajouter que la cause impulsive, "telle que nous venons de l'exposer, c'est-à-dire *le motif du* "*contrat*, est sans aucune influence sur la formation et sur la "validité du contrat.

"Qu'il soit sérieux, en effet, ou frivole, il n'importe;

"Pas plus qu'il n'importe qu'il soit licite ou illicite."

L'art. 989 du Code civil qui veut que le contrat sans considération, ou fondé sur une considération illégale soit sans effet ne se rapporte qu'à la cause finale et déterminante "Dans un contrat synallagmatique," dit Demolombe, no. 346, "l'obligation de chaque partie a pour cause l'obligation de "l'autre." S'il est vrai que, lorsque l'Intimé a cédé ses propriétés à l'Appelant, il a été convenu, comme l'allègue l'Intimé, que l'Appelant n'en aurait que l'administration et qu'il les lui remettrait lorsqu'il en serait requis, cette obligation ou cette promesse de l'Appelant a été la cause finale qui a déterminé l'Intimé à lui céder ses propriétés, et s'il l'a fait pour sous-

trainé ses biens à la poursuite de ses créanciers, ce n'est là que le motif qui l'a porté à faire la transaction, et ce motif, quelque répréhensible qu'il puisse être, ne peut affecter l'obligation que l'Appelant a contractée envers lui de lui remettre ses biens.

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Si, lors de l'acte du 22 Décembre 1862, l'Appelant avait donné une contre-lettre par laquelle il s'obligeait de remettre à l'Intimé ses propriétés à demande, ou, encore, qu'il eût par l'acte même promis de lui payer une somme quelconque pour le prix de ces propriétés, l'Appelant ne pourrait se refuser d'accomplir sa promesse, dans un cas, de remettre les propriétés à l'Intimé, et, dans l'autre, de lui payer la somme convenue, sous le prétexte que l'Intimé aurait fait cette transaction pour mettre ses biens à l'abri des poursuites de ses créanciers, ou dans le but de se procurer de l'argent pour payer une dette de jeu ou pour quelque autre objet illicite.

L'Appelant ne pourrait être reçu à proposer de semblables objections pour la raison que le motif de l'Intimé quel qu'il fût, ne fesait aucune partie de la cause ou considération de la transaction. Il en serait autrement si l'Intimé n'avait cédé ses biens à l'Appelant qu'à la condition que l'Appelant ferait quelque chose de contraire à la morale ou à l'ordre public. Dans ce cas la maxime "Nemo auditur propriam turpitudinem allegans" serait appliquable. Ici l'Intimé n'avait pas à alléguer sa propre turpitude, et il n'était pas obligé de le faire pour réclamer ses biens, il lui suffisait d'alléguer la convention d'où il prétend faire résulter son droit d'action. C'est l'Appelant qui cherche à impugner ses motifs en alléguant quelque chose tout à fait en dehors du contrat.

Le fait que l'acte n'exprime pas la véritable cause du contrat que les parties ont fait n'altère pas leurs droits et ne rend pas nulle l'obligation de l'Appelant, si cette obligation a une cause juste et légale. (Demolombe, t. 24, no. 370, et les nombreux arrêts cités.)

Ce fait rend seulement plus difficile la preuve que l'Intimé sera obligé de faire. Il lui faudra prouver non seulement qu'il n'a pas reçu de considération pour la cession qu'il a faite à l'Appelant, mais que de plus la cause réelle de la cession qu'il a faite était la promesse que l'Appelant lui a faite de révoquer cet acte et de lui remettre ce qu'il avait reçu de lui, lorsqu'il en serait requis. (Demolombe, t. 24, no. 371,

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372 et 373.) Si cette preuve est faite, il ne restera plus aux tribunaux saisis de la demande qu'à prononcer la résolution de l'acte. (Chardon, Dol et Fraude, t. 2, no. 47, 48.)

L'Appelant a cité la cause de Gareau et Gareau (24 L. C. J. 248) comme ayant jugé le contraire; mais il n'y a aucune parité entre les deux causes. Ici le litige est entre les parties au contrat. L'Intimé demande à ce que l'Appelant soit tenu de lui remettre des propriétés pour lesquelles il ne lui a donné aucune valeur. Dans celle de Gareau et Gareau, l'action était contre un tiers défendeur qui avait acheté la propriété vendue pour une somme de $2,400 que le demandeur n'offrait pas même de lui remettre. (1)

Quant à la troisième défense en droit, elle s'applique à une partie des exceptions de l'Appelant qui est évidemment mal fondée en droit. En supposant, comme il le prétend, que l'Appelant aurait rendu de grands services à l'Intimé, cela ne le dispenserait pas de remettre à l'Intimé les propriétés qu'il a eues de lui, s'il a promis de le faire, et n'est pas une réponse à l'action.

Jugement confirmé.

J. A. C. Madore pour l'Appelant.
Pagnuelo & Lanctot pour l'Intimé.

(1) *Gareau & Gareau.*—L'Appelant, François-Xavier Gareau avait, par acte de vente du 15 Novembre 1861, cédé à J. N. A. Mackay, son beau-frère, un immeuble à la charge de payer les hypothèques dont il était grevé au montant de $1,571.—Charles Gareau ayant fait saisir cet immeuble comme appartenant à son débiteur F.-X. Gareau, Mackay fit une opposition, alléguant que l'immeuble saisi lui appartenait en vertu de la vente que F.-X. Gareau lui en avait faite le 15 Novembre 1861, et F.-X. Gareau avait lui-même donné l'affidavit que les allégués de l'opposition étaient vrais.—Charles Gareau contesta cette opposition et intenta une action au nom de P. M. Galarneau pour faire déclarer que l'acte du 15 Novembre 1861 était nul, comme ayant été fait en fraude de ses droits. Pendant ces procédures, auxquelles F.-X. Gareau était partie, Mackay, par acte du 23 Février 1864, a vendu l'immeuble en question à Charles Gareau pour la somme de $2,400 dont $50 furent payées comptant, $80 devaient être payées en marchandises et la balance devait servir à acquitter les créances hypothécaires qui affectaient l'immeuble. Charles Gareau s'obligea de discontinuer l'action de Galarneau et d'en payer les frais, ainsi que ceux de la saisie qu'il avait faite, et de la contestation de l'opposition de Mackay.

Ce n'est qu'en 1876, quinze ans après l'acte du 13 Novembre 1861 et douze ans après celui du 24 Février 1864, que François-Xavier Gareau a

MONTREAL, 27th MARCH, 1884.

Coram DORION, C. J., MONK, RAMSAY, CROSS, BABY, J J

THE QUEEN,

vs.

EUGÈNE HÉBERT.

HELD :—1st. That the Judge of Sessions has no authority to try under the Speedy trials act (32 and 33 Vict. ch. 35) a charge of forgery.

2nd. That the Court of appeals, civil side, will not grant a writ of certiorari to remove a case from the sessions of the Peace to the Crown side of the Court of Queen's Bench—such application should be made to the Crown side of the Court.

DORION, C. J.—This is an application on behalf of Her Majesty's Attorney General for a writ of certiorari to remove to the Court of Queen's Bench, Crown side, the record and proceedings had against the Defendant on a complaint for forgery, now pending before A. DUGAS, ESQUIRE, Judge of Sessions.

The Defendant having first elected to be tried under the Speedy trials act, and without a jury, when brought before

demandé à faire mettre ces deux actes de côté, (sans même offrir de rembourser les dettes hypothécaires que Charles Gareau avait payées à son acquit) le premier, parce qu'il était simulé, et le second parce qu'il avait été fait par fraude et connivence entre Mackay et Charles Gareau.

Sur une défense en droit, la Cour de première instance a renvoyé l'action quant à Charles Gareau seul—et ce jugement a été confirmé en appel.

Ni la Cour de première instance ni la Cour d'appel n'ont décidé dans cette cause " Que l'une des parties à un contrat simulé et frauduleux, et " qui a participé à la fraude, n'est pas recevable à demander la révocation de ce contrat *lors même que ce serait contre celui des contractants* " *qui le premier a voulu consommer la fraude projetée* ; en un mot, qu'on " ne peut, en invoquant sa propre turpitude, demander en loi la rescision " du contrat auquel on a été partie," ainsi qu'il est mentionné en tête du rapport publié dans le Lower Canada Jurist, t. 24, p. 248 ; tout ce que la Cour a jugé, c'est que dans les circonstances spéciales de la cause, François-X. Gareau, qui alléguait avoir vendu l'immeuble dont il était question, pour frauder ses créanciers, ne pouvait demander à un tiers acquéreur qui avait acquis cet immeuble pour une somme d'au-delà de $2,400 et qui l'avait possédé depuis plus de douze ans, que cette dernière vente fût déclarée nulle. Il n'a rien été décidé quant à l'acte du 15 Novembre 1861 entre F.-X. Gareau et son beau-frère, Mackay, et en cela la cause de Gareau et Gareau diffère essentiellement de celle de Dorion et Dorion rapportée plus haut.

The Queen & Eugène Hébert

the weekly sessions of the peace has pleaded guilty to the charge of forgery. He was remanded to await his sentence.

The Attorney General submits that the judge of sessions has no jurisdiction to try the Defendant for forgery, which is not an offence cognizable by the Court of General or Quarter Sessions of the peace.

The application is resisted by the Defendant on the ground that by section 12 of the Criminal Procedure Act (32 and 33 Vict., c. 29) the only cases excluded from the jurisdiction of the Courts of General or Quarter Sessions of the Peace are treason, felonies punishable by death, and libel.

We are all of opinion that the judge of sessions has no jurisdiction under the Act for the more speedy trials in certain cases of persons charged with felonies and misdemeanors (32 and 33 Vict., ch. 35) to try a case of forgery. This act merely gives to the judge of sessions authority to try, with their consent, persons accused of offences which, without their consent, might be tried before a Court of General Sessions of the Peace. By referring to ch. 97 of the Consolidated Statutes of Lower Canada, we find that Courts of General Sessions of the Peace may hear and determine all matters relating to the preservation of the peace and whatsoever was cognizable by them according to the laws of England then in force in Canada.

The crime of forgery was never cognizable by Courts of Sessions of the Peace in England, (2 Russell, p. 814. Rex *vs.* Higgins, 2 East, 18. Rex *vs.* Gibbs, 1 East, 173. Reg. *vs.* Rigby 8 C. & P. 770. Reg. *vs.* Dunlop, 15 U. C. Q. B. 118. Reg. *vs.* McDonald, 31 U. C. Q. B. 327. Reg. *vs.* Currie, 31 U. C. Q. B. 582, and by the Imperial Act 5 and 6 Vict., ch. 38, forgery is declared to be one of the crimes over which the Sessions of the Peace have no jurisdiction. (This last Act is not in force here.)

The omission to mention the crime of forgery in the 12th Sect. of the Criminal Procedure act, as one of those over which the Sessions of the Peace have no jurisdiction, cannot by inference give to those courts a jurisdiction which they had not before the Act was passed, and it has been invariably held, both here and in England, that the Courts of Sessions have no jurisdiction in cases of forgery.

This application gives rise to some difficulty as to whether

a writ of certiorari to remove the case into the Crown side of the Court of Queen's Bench, can be issued by this Court sitting as a Court of Appeals in civil matters only. The jurisdiction of this Court in criminal matters seems to be limited by Statute to *reserved cases, writs of error, and writs of habeas corpus.*

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In England, writs of certiorari to remove a case from an inferior tribunal to the Court of Queen's Bench are issued from the Crown office. (Archbold, p. 76.)

I have only been able to find two precedents here for the present application; the first is the case of the Queen *vs.* Delisle for assault, and the second is that of the Queen *vs.* Johnson, for refusing, as Secretary of a Railway Co., to register in the books of the Company certain transfers of shares.

In both cases the applications were made to the Crown side of the Court and they were granted by Chief Justice Lafontaine and by Mr. Justice Aylwin who held the October term in the year 1856. The Defendants were subsequently tried before the Court of Queen's Bench.

In England the writ can also be issued on the order of a Judge in Chambers under a Statute which does not seem to be in force here. We have not been able to satisfy ourselves that we had jurisdiction to entertain the application in this case, which is, therefore, rejected.

We hope that the opinion that we have expressed, that the judge of Sessions has no jurisdiction to try a case of forgery, will prevent any further proceedings on his part, except such as may be necessary to remand the Defendant to stand his trial before the Court of Queen's Bench at its next sitting.

If, contrary to our expectations, our judgment had not this effect, the application might be renewed before the Crown side of the Court at its next sitting according to precedent, or perhaps before a Judge in Chamber. Although we refrain from expressing any opinion as to the right of a Judge in vacation to grant such an application.

C. P. Davidson, Q. C. for Attorney General.

M. Bisaillon, for Defendant.

MONTREAL, MARCH 20th, 1884.

Coram DORION, C. J., MONK, CROSS, TESSIER, BABY, J. J.

BEAUPRÉ,

Defendant in the Court below,

APPELLANT;

&

THE HON. J. R. THIBAUDEAU & AL,

Plaintiffs in the Court below,

RESPONDENTS.

HELD:—That where a debtor has obtained his discharge under the Insolvent Act of 1875, after secreting and transferring his property in his family and continues to do the same afterwards, his creditors may claim a debt previous to said discharge and under such circumstances a capias will be held to be valid.

MR. JUSTICE CROSS.—A trading firm of Beaupré & Piché had for a time carried on business in two establishments, one at St Guillaume or St. Michel d'Yamaska and one at Drummondville. Finding themselves embarrassed they, on the 21st June, 1876, got an extension of time from their creditors. They agreed to pay $800 on the 1st July then next, and $200 per month afterwards, until their debts were discharged. The firm of Hudon & Co. were named attorneys to act for the creditors, and received from Beaupré the conveyance of two barges, the Dufferin and the Philipe, which were to remain in their hands as security for the fulfilment of their promises.

After a time, failing in their payments, they were, on the 7th September, 1877, put into the Insolvent Court.

On the 10th of June, 1879, one of their creditors, the firm of Thibaudeau & Co., arrested Beaupré by writ of capias on a suit for $796,45, based on an account for goods and four promissory notes of Beaupré & Piché, all bearing date the 6th November, 1875, but payable at various dates. The affidavit for the capias was made by J. Rosaire Thibaudeau, one of the firm of Thibaudeau & Co., in which he swore that Beaupré had secreted part of his estate, and was about to secrete the remainder.

The demand for judgment for the debt was not contested, but Beaupré petitioned to set aside the capias. In his petition he pleaded that the allegations of the affidavit were false; that Beaupré & Piché had made an assignment on the 7th September, 1877, and that since the issuing of the capias their creditors had discharged them under the operation of the Insolvent Act of 1875, which discharge had been confirmed by judgment of the Superior Court at Sorel, rendered on the 6th October, 1879.

Thibaudeau replied affirming the allegations of the affidavit, and alleging that the consent of the creditors had been obtained by false representations and fraud.

The parties having adduced their proof and a hearing had, the Superior Court, on the 13th February, 1882, rendered judgment dismissing the petition, and on the 2nd May following final judgment was given for the debt, and holding the capias valid.

Beaupré has appealed, the indebtedness is not disputed, and the only question raised is whether Thibaudeau & Co. were justified in adopting the remedy of capias.

The petitioner certainly succeeded in showing by Mr. Rosaire Thibaudeau's own evidence, that personally he Thibaudeau knew very little of the grounds of fraud imputed to the petitioner. He, in effect, states that he was informed of the circumstances of fraud when the capias was taken out, but had forgotten the circumstances and the details.

On the other hand, the circumstances brought out in proof by the Respondent, go to show that soon after the extension of time granted to Beaupré & Piché, Beaupré's wife had procured a judgment of separation of property from her husband. This judgment was rendered on the 17th of October, 1876, and decreed the payment of a considerable sum for *reprises matrimoniales*. In December, 1876, he made a transfer to his wife, in the name of *dation en paiement* of assets to the amount of $7,662.

On the 3rd of September, 1877, some four days before the issue of the warrant in insolvency, he transferred to his son, Philip, a sum of $2,000, due by one Pierre Letendre, his son being then quite a young man without ostensible means save what he got from his father.

On the 18th of April, 1879, he made a further transfer to

Beaupré & Hon. J. B. Thibaudeau et al.

his son of $600, due by one Rémi Manégre of a judgment obtained on the 17th of March, 1879.

In February, March and April, 1879, Pierre Letendre had a correspondence with the firm of Hudon & Co., one of whom had been acting as inspector on the estate of Beaupré & Piché since they went into insolvency. That firm had prosecuted Beaupré for fraud and the result of the correspondence was that the two barges which stood in the name of one of the partners of that firm were transferred to Mme. Beaupré and in return her notes were given for $1,000 endorsed by Letendre and by Narcisse Beaupré, Maxime's brother.

On the 21st of September, 1880, he also received from Jos. Fagnan, by one Félix Duval, $100 due under an obligation of date the 7th September, 1876.

It is further proved that on the insolvency occurring Beaupré took possession and appropriated the effects in the Drummondville store.

Further, that on a requête civile the confirmation of Beaupré's certificate was set aside on the 6th October, 1879.

It thus appears that from the time of the extension obtained by the firm of Beaupré & Piché, Beaupré was continually passing his property out of his hands and in utter disregard of the proceedings in insolvency he continued to misappropriate his means, and did so even after the capias issued.

Whatever explanations any of these transactions was capable of, many of them are by no means cleared up, none of them in fact. To all appearance there was a continued series of frauds perpetrated by Beaupré quite sufficient to warrant the capias. The Court is of opinion that the judgment appealed from should be confirmed.

Judgment confirmed.

Messrs. Girouard & McGibbon, for Appellant.

Messrs. Geoffrion, Rinfret & Dorion, for Respondents.

MONTRÉAL, 27 SEPTEMBRE, 1883.

Coram DORION, J. C., MONK, CROSS, BABY, J. J.

No. 100.

J. B. T. DORION,

APPELANT.

&

P. A. A. DORION,

INTIMÉ.

JUGÉ : Que le cautionnement fourni pour appeler d'un jugement de la Cour supérieure est irrégulier s'il n'a été précédé d'un avis à la partie adverse, et que dans ce cas l'appel doit être renvoyé.

DORION, J. C.—L'Appelant a fourni un cautionnement pour appeler sans en donner avis à l'Intimé. Celui-ci fait motion que l'appel soit renvoyé. 1o. Parce que le cautionnement a été donné sans qu'il en ait eu d'avis. 2o. Parce que le cautionnement est insuffisant.

L'art. 1124 du Code de Procédure qui oblige la partie qui appelle d'un jugement à donner caution ne dit pas que ce cautionnement sera précédé d'un avis à la partie adverse, mais nulle procédure ne peut être faite dans une cause sans un avis préalable, à moins d'une dispense expresse. L'art. 514 C. de P., qui règle la manière dont les cautionnements ordonnés en justice seront fournis, veut qu'ils le soient sur avis signifié à la partie adverse, et, quant aux appels de la Cour de circuit, l'art. 1143 dispense l'appelant d'en donner avis. C'est là une disposition exceptionnelle et si le législateur eût voulu l'appliquer aux appels de la Cour Supérieure, il n'eût pas manqué de le déclarer. L'article 1124 ne contient aucune déclaration à cet effet, et, par conséquent, aucune dispense de se conformer à la règle générale.

Dans la pratique, il a toujours été permis à un intimé de paraître devant le juge ou le protonotaire qui doit recevoir le cautionnement et de contester la suffisance des cautions. Comment pourrait-il faire ses objections si on ne lui donne pas avis du jour ou le cautionnement devra être fourni ?

Nous croyons que si l'on permettait de fournir un cautionnement sur appel sans avis préalable, il en résulterait des inconvénients et souvent des injustices graves.

J. B. T. Dorion & P. A. A. Dorion.

Il est vrai que celui qui appelle d'un jugement de la Cour n'est pas obligé de donner avis du cautionnement qu'il est obligé de fournir, mais outre que, dans la plupart des causes, la Cour de circuit n'a de juridiction que dans les demandes de $200 et au-dessous, la législature a pris soin d'indiquer d'une manière spéciale quel cautionnement l'Appelant devait fournir.

La Cour, étant d'opinion que sur sa première objection l'Intimé doit réussir, n'a pas à s'occuper de la suffisance du cautionnement.

L'appel est renvoyé avec dépens, parce que le cautionnement pour l'appel a été donné d'une manière irrégulière et sans avis préalable.

Appel renvoyé.

S. Pagnuelo, C. R. pour l'Appelant.

J. A. C. Madore pour l'Intimé.

MONTRÉAL, 17 NOVEMBRE, 1883.

Coram DORION, J. C., MONK, RAMSAY, TESSIER, CROSS, J.J.

Nos. 350 & 349.

P. A. A. DORION,

Défendeur en Cour de 1re instance,

APPELANT,

&

J. B. T. DORION,

Demandeur en Cour de 1re instance,

INTIMÉ,

&

E CONTRA.

Le 4 février 1880, l'Appelant a donné à l'Intimé pour balance d'un prix de vente, son chèque sur la Banque du Peuple pour la somme de $3,333.34 après avoir écrit sur la marge du chèque les mots "payable sous huit jours." L'action est portée sur ce chèque et l'Appelant plaide que l'immeuble pour le prix duquel ce chèque a été donné est chargé, envers le Séminaire de Montréal, d'une somme de $414.16 pour commutation et d'une somme de $979.90 pour taxes municipales dues à la Cité de Montréal. L'Appelant a de plus opposé en compensation diverses créances qu'il avait contre l'Intimé lorsque le chèque a été donné et d'autres qu'il a acquises depuis.

JUGÉ :—1o. Que sous les circonstances le chèque doit être considéré comme devant être payé à tout événement et sans égard aux créances que l'Appelant peut avoir contre l'Intimé, et qu'il ne peut opposer ces créances pour compenser la demande de l'Intimé.

2o. Que la commutation des droits seigneuriaux due au Séminaire de Montréal en vertu du ch. 41, sect. 67, des Statuts Refondus du B. C. sur la mutation qui a eu lieu par la vente que l'Intimé a faite à l'Appelant est due par l'Appelant qui a acheté et non par le vendeur.

3o. Que l'Appelant, qui aurait eu le droit de retenir sur le prix de vente les taxes dues sur la propriété qu'il a achetée de l'Intimé, a le droit de demander que la somme qu'il a payée pour les taxes dues par l'intimé soit déduite du montant du chèque qu'il a donné.

Le 28 novembre 1879, l'Intimé, demandeur en Cour de 1re instance, a vendu à l'Appelant les deux tiers indivis, plus l'usufruit de l'autre tiers d'un immeuble situé dans la Cité de Montréal.

La valeur de l'immeuble fut fixée à $8,000 dont les deux tiers devaient être payés à l'Intimé pour la part dont il était propriétaire, et l'Appelant devait retenir l'autre tiers et n'en payer que l'intérêt à l'Intimé tant que son usufruit durerait.

Le 4 février 1880, les parties qui avaient des réclamations réciproques résultant de ce que l'Appelant avait été depuis

P. A. A. Dorion & J. B. T. Dorion & E Contra.

plusieurs années l'agent de l'Intimé, réglèrent relativement à cette vente de propriété et l'Appelant donna à l'Intimé son chèque sur la Banque du Peuple pour la somme de $3,333.31 balance du prix de vente, après avoir écrit à la marge les mots "payable sous huit jours."

Le chèque n'ayant pas été payé, l'Intimé en réclame le paiement par cette action.

L'Appelant a répondu à cette demande qu'il avait le droit d'opposer à l'Intimé 1o. la somme de $414.16 pour les deux tiers de la commutation des droits seigneuriaux qu'il avait été obligé de payer au Séminaire de Saint-Sulpice, pour les deux tiers de la propriété que l'Intimé lui avait vendus.

2o Celle de $979.90 pour taxes municipales qu'il avait payées à la Cité de Montréal. 3o. diverses créances qu'il avait contre l'Intimé et qui excédaient le montant du chèque réclamé, et enfin une somme de $1,000, montant d'un billet qu'il avait payé à la Banque du Peuple pour l'Intimé depuis la date du chèque.

La Cour de première instance a rejeté l'exception de compensation quant à toutes les réclamations qui découlaient d'autres sources que de la vente de l'immeuble pour le prix duquel l'Appelant avait donné son chèque; mais elle a maintenu qu'il y avait compensation jusqu'à concurrence du montant de la commutation et des taxes payées par l'Appelant.

De ce jugement les deux parties ont appelé, l'Appelant parce que son exception de compensation a été rejetée en partie, et l'Intimé parce qu'elle a été maintenue quant à la commutation et aux taxes que l'Appelant a payées.

Dorion, J. C.—Dans le cours ordinaire des affaires, la plupart des paiements de quelqu'importance se font par des chèques, c'est-à-dire, par des ordres sur un banquier qui est requis de les solder à même les fonds qu'il a entre les mains appartenant au tireur. Ces chèques font en quelque sorte les fonctions de numéraire et sont ordinairement reçus, sauf encaissement, comme des paiements au comptant. Celui qui donne un chèque, à moins de circonstances spéciales, ne peut ni en arrêter le paiement, ni opposer au porteur d'autres créances pour le compenser.

Mais l'Appelant répond: "Le chèque ou ordre que j'ai donné n'était payable que sous huit jours." Ce n'est pas un chèque

ordinaire, mais plutôt une lettre de change, et j'ai le droit d'opposer à l'Intimé toutes les exceptions que j'aurais pu lui opposer s'il était porteur d'une lettre de change dont le paiement aurait été refusé.

Il n'est pas nécessaire d'examiner ici si un chèque peut être fait payable à un jour ultérieur sans être considéré à toutes fins comme étant une lettre de change. En Angleterre un chèque doit être payable à demande, du moins d'après la législation la plus récente; aux Etats-Unis la question est controversée, et l'article 2349 du Code civil, qui donne la définition d'un chèque, n'en dit absolument rien.

Le chèque que l'Appelant a donné à l'Intimé est dans la forme ordinaire, et il serait payable à demande sans les mots écrits à la marge "payable sous huit jours." Ces mots, entièrement séparés du chèque, ont-ils l'effet d'en changer le caractère? nous en doutons; mais quel que soit l'effet de cette addition, c'est d'après l'intention que les parties ont eue, l'Appelant en donnant et l'Intimé en recevant le chèque ou ordre dont il est question, que l'on doit juger si l'Appelant peut invoquer la compensation ou non.

L'Appelant n'ignorait pas, lorsqu'il a donné son chèque à l'Intimé pour balance d'un prix de vente, qu'il avait contre l'Intimé les réclamations qu'il veut maintenant lui opposer en compensation. En donnant son chèque sur la Banque du Peuple, il est censé avoir voulu lui payer comptant la balance qu'il reconnaissait lui devoir sur cette transaction spéciale, et les mots qui se trouvent à la marge ne peuvent être considérés que comme une demande de ne présenter ce chèque à la banque que sous huit jours.

L'Appelant, en donnant son chèque à l'Intimé a renoncé au droit qu'il aurait eu de lui opposer en compensation les créances qu'il pouvait avoir contre lui, et il ne pouvait, en donnant ordre à la banque de ne point payer son chèque, faire revivre son droit d'opposer la compensation auquel il avait renoncé.

Ceci dispose de l'exception de compensation quant à toutes les créances que l'Appelant prétend qu'il avait contre l'Intimé à l'époque où il lui a donné son chèque.

Pour ce qui est du billet que l'Appelant prétend avoir payé pour l'Intimé depuis la date du chèque, ce billet n'a ni été produit ni prouvé, et, l'eût-il été, il ne pourrait, pas plus que

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les créances antérieures, être opposé en compensation du chèque dont l'Intimé réclame le paiement.

L'appel principal doit donc être renvoyé avec dépens.

Sur l'appel incident, nous sommes d'opinion que la commutation que l'Appelant a payée au Séminaire de St. Sulpice était due par lui et non par l'Intimé.

D'après le chap. 41 des Statuts Refondus du Bas-Canada, sect. 67, cette commutation est exigible à la première mutation de propriétaire qui a lieu après la date du 4 mai 1859, et elle est payable de la même manière que les lods et ventes et autres droits casuels auxquels elle a été substituée. Or, la propriété dont il est question a changé de mains pour la première fois depuis le 4 mai 1859, par la vente que l'Intimé en a faite à l'Appelant le 28 novembre 1879. La commutation n'est donc devenue exigible que lors de l'acquisition que l'Appelant a faite de la propriété, et comme il aurait été obligé de payer les lods et ventes, s'ils n'avaient été commués, il doit de même en payer la commutation. Cela a été ainsi jugé dans la cause de *Devlin* & *Morgan*, 20 L. C. J., p. 132.

La somme de $414.16 payée pour la commutation n'aurait pas dû être déduite du montant réclamé par l'Intimé.

Quant aux arrérages de taxes municipales que l'Appelant a payées, elles ont été avec raison déduites du montant réclamé, non pas tant à titre de compensation, que parce que l'Appelant aurait eu le droit de déduire la somme à laquelle ces taxes s'élevaient du prix de vente et de ne donner son chèque que pour la balance, s'il eût su que ces taxes étaient dues, ou du moins d'exiger qu'elles fussent acquittées avant de payer son prix de vente. Il a donc donné son chèque pour plus qu'il ne devait et s'il l'eût payé il aurait eu le droit de répéter de l'Intimé la somme qu'il aurait payée pour ces taxes comme ayant payé ce qu'il ne devait pas; il est donc en droit de retenir la somme de $979.80 sur le montant de son chèque comme s'il n'avait donné son chèque que déduction faite de ces taxes.

Le jugement doit être réformé et l'Appelant condamné à payer à l'Intimé la somme de $2,353.54 avec intérêt et les dépens tant en Cour de première instance que sur l'appel.

Jugement réformé.

J. A. C. Madore pour l'Appelant.

Pagnuelo & Lanctot pour l'Intimé.

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